

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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2 Therefore, it will be the main topic of our next ex-
3 ecutive committee meeting, and every effort we can
4 make will be made to come to a decision on five p.m.
5 Friday, December 12th.

6 I would like to point out on the record
7 in connection with that that this minute precedes the
8 restated articles of the limited partnership.

9 MR. SHAW: We know that. We can save
10 time with that comment.

11 THE COURT: Also, it precedes Mr. Rubin
12 and Mr. Therese coming in and he was yesterday dis-
13 tressed that he had been initially promised to come
14 in without payme and then was required to come up
15 for some points.

16 MR. SHAW: December 16, 1969, paragraphs
17 1, 2 and 3:

18 The recapitalization plan was discussed
19 further. Leo Stern wishes time to consider and study.
20 It was agreed that this was proper but that we should
21 move ahead and implement even if we should find it
22 necessary to retrace our steps later.

23 MR. MANDEL: That's the first. I do not
24 think it is relevant, but I think it is harmless.

25 THE COURT: It may be permitted.

MR. SHAW: Paragraph number 2:

Robert Stern reported that he had another meeting with the auditors; that they would file on the 15th. He stated that a reserve of one and a half million for past operational problems and differences must be set up. At the end of November we had a capital ratio of approximately 14. This may improve as we work out differences between now and the end of the year. We have a debit balance of approximately 44 million and our bank loans --

MR. MANDEL: I don't know what that is relevant to.

MR. SHAW: I think this is relevant to the fact that this is the condition of Newburger Loeb as at that point, and this is a condition that nobody who subsequently became a partner who has testified here was advised about. I think it is relevant to the financial condition of Newburger Loeb that at this time it was on its last legs; it was having serious problems and what Mr. Gross was trying to do was to introduce new partners, get them to invest, and subsequently to get out himself.

MR. MANDEL: We do not have a case before this Court regarding frauds committed upon Therese or anybody who became a partner. There were seven members

of the executive committee who held all of this, and somehow out of nothing this is supposed to be some kind of evidence that Charles Gross is guilty.

MR. SHAW: We have an issue as to what the fiduciary obligations between partners are, and it is highly irrelevant that one partner would not make a disclosure to other partners about the financial condition of the company.

THE COURT: This is an executive committee meeting. All the partners on the executive committee were aware of it.

MR. SHAW: None of these persons told Therese or --

THE COURT: I sustain the objection.

MR. SHAW: Paragraph 3. The year's loss will be slightly under one million, however, he feels that we have turned the corner and that the last few months represent a period of some profit. He expects that December will also be profitable. He pointed out that Kayne would like to have the same interest in the firm pointwise as Sloane. We agreed. The search for a floor candidate continues.

This is not a fact that Kayne was advised of, nor was Sloane advised of it when they were made

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2 partners or induced to invest to become partners.

3 THE COURT: That requires us then to get
4 into a relitigation of the issue. We are not going to
5 get into that. The rejection is sustained.

6 MR. SHAW: December 24, 1969, paragraph 2:

7 The managing partners' report flowed into a
8 discussion of various items.

9 Paragraph A: Recapitalization plan. Leo
10 Stern agreed to go along with plan as it had been ex-
11 plained. We agree that a six month period be allowed
12 for the raising of certain monies for use as point
13 capital. It was specifically pointed out that this did
14 not represent an option to buy points by any particular
15 partner, but rather an obligation.

16 I think that's relevant because it establish-
17 es as early as December 24, 1969 that there was an
18 effort upon the part of the various members of the
19 executive committee to obtain the tax refunds to be
20 paid into the partnership. Of course, that did not
21 occur. Nobody would go along with that until there
22 was a valid plan for reorganization, so that the
23 various partners who did put money up would not think
24 that the business would (a) go down the drain shortly
25 thereafter or (b) that the money that they put up

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would go back into the pockets of other persons.

MR. MANDEL: I believe this is not related to any of the issues.

THE COURT: Sustained.

MR. SHAW: December 24, 1969. Paragraph 5: Andrew Newburger felt that we should reconsider our move to 1 New York Plaza. After lengthy discussion it was decided to proceed as planned. However, we will, no doubt, take a look at this situation from time to time.

THE COURT: Sustained.

MR. SHAW: January 6, 1970, Paragraph 2: Charles Gross and Robert Stern reported in a tweedledum and tweedledee-ish manner --

I think we can agree that that is the New York Stock Exchange, the reference to the Red Fortress.

MR. MANDEL: Yes. We can agree that that means the New York Stock Exchange.

MR. SHAW: They were accompanied by Therese and Shelley. They met with Newman and Fitzgerald. The goal was the lifting of restrictions. Results: permission to open our California offices at the end of this month and the understanding that the remainder of our restrictions will probably be lifted shortly after we work our short

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differences to below one million.

I submit that that is relevant, your Honor, to show the financial condition of the company, and at that time when this was the fact, although Mr. Kayne is being approached to become a general partner, he was not advised. This, I think, shows the level of the fiduciary relationship existing between these partners.

MR. MANDEL: I believe that's irrelevant to the issues of this case.

THE COURT: I will allow it to stand.

MR. SHAW: January 20, 1970. I think it is relevant your Honor, to indicate that at that point, January 20, 1970, Leo Stern was a member of the executive committee. Ned D. Frank was a member of the executive committee, in addition to Charles H. Gross.

Charles Gross reported tentative figures for 1969, based on figures compiled by our outside accountant, Berkowitz. The loss is approximately \$1,230,000. This includes approximately 750,000 for the partners' salaries and \$500,000 for interest on partners' capital. We should be able to make an impressive improvement on the expense factor for this coming year. In 1969 overtime amounted to about \$300,000. Agency fees \$44,000 and temporary help, \$95,000.

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2 It is felt that we should be able to cut
3 these costs by at least \$250,000 by 1970.

4 There is also the feeling that the general
5 payroll will be reduced.

6 It is also hoped that a new schedule of in-
7 terest on customer debit balances should pick up between
8 \$175,000 to \$200,000.

9 Another big item of expense in 1969 was
10 floor brokerage. This amount, the use of Charles Gross'
11 seat in 1970, should save us approximately \$100,000.

12 We had hoped that a profit from the under-
13 writing of Computer Software Systems would go into 1969;
14 however, it will be in 1970 and the gross profit after
15 sales as compensation would appear to be between \$175,000
16 and \$200,000.

17 It is relevant your Honor, to indicate that
18 where a loss of a million dollars had been projected by
19 Mr. Gross as early as the preceding month, in fact the
20 loss was \$1,230,000.

21 THE COURT: Let me ask you this: Are you
22 seriously contending that management being off 20% --

23 MR. SHAW: 25%.

24 THE COURT: That that's a significant factor
25 here, in your case?

MR. SHAW: It is only to show how the company was managed from the time.

THE COURT: I will permit it to stand, but I do not think it has any great bearing on the issues.

MR. SHAW: January 27, 1970. Again, Leo Stern, Charles Gross, Ned D. Frank, members of the executive committee, paragraph 8:

Managing partners' report was concise, succinct and dramatic. Hurray. No more Stock Exchange probation.

That, I think, we could stipulate means that the restrictions had been lifted.

THE COURT: I will permit it to stand.

MR. SHAW: February 3, 1970 minutes only to indicate that Leo Stern and Ned D. Frank were members of the executive committee.

THE COURT: All right.

MR. SHAW: Paragraph number 2:

The minutes of February 10, 1970:

Leo Stern is a member of the executive committee. Ned Frank was absent that day.

Paragraph 2: the managing partner reported, among other things, the success of our bid for a NAB franchise in Buffalo. Newburger Loeb & Company would

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receive remunerations and expenses for its effort so far as well as between five and eight percent of the stock involved.

THE COURT: Didn't we just a day or so ago agree that there was going to be no proof, that you had no proof, on this trial that Mr. Gross' participation in the purchase of the basketball team gave rise to any actionable claim against it?

MR. SHAW: No cause of action.

THE COURT: I will sustain this objection.

MR. SHAW: I felt in the context of the partnership accounting it was a business mistake which could be considered by one partner against another and striking it out.

THE COURT: you have got a record more than amply made to make that limited argument.

MR. SHAW: February 17, 1970: minutes of the executive committee: Leo Stern and Ned D. Psank are members of the executive committee, as well as all during this period, and Charles Gross.

Paragraph number 4: Our earlier question, guestimates on January figures were -- it now appears -- much to optimistic. Our rent figures show a loss possibly as great as \$73,000. This is to be analyzed

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2 further. Obviously, efforts must be made to cut costs
3 and, quite naturally, increase production.

4 This is the beginning of the losses. Mr.
5 Gross' testimony was that losses were sustained in
6 January and February.

7 THE COURT: I will sustain an objection.

8 MR. SHAW: Paragraph number 5: The salary
9 committee's report to the executive committee, was with
10 a few minor exceptions, accepted. All partners with a
11 few somewhat unique exceptions are going to be asked to
12 temporarily take a ten percent cut based upon the afore-
13 mentioned salaries. Rather than making a general memo-
14 randum on salaries, Charles Gross and Robert Newburger
15 are to have discussions with each individual partner.

16 To indicate the state of the business at
17 that time, that the partners began to take salary cuts.

18 THE COURT: Objection sustained.

19 MR. SHAW: February 24, 1970: Leo Stern
20 and Ned D. Frank are still members of the executive com-
21 mittee.

22 Paragraph 2 (b): Robert L. Stern reported
23 that we are victims of an embezzlement in the amount of
24 approximately \$70,000 as of now. This figure is subject
25 to change, naturally. It would appear that other

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2 brokerage firms are involved and that the total amount
3 at this point is \$500,000. Our insurance people, our
4 attorneys, the district attorney's office, and the
5 local --

6 THE COURT: What does this have to do with
7 anything?

8 MR. SHAW: This is a factor which subsequently
9 along with other various things, contributed, according
10 to the testimony, to the firm's financial plight.

11 THE COURT: How do you charge anybody in
12 this room with that embezzlement?

13 MR. SHAW: We don't.

14 THE COURT: Objection sustained.

15 MR. SHAW: March 10, 1970: Leo Stern,
16 member of the executive committee; Charles Gross.

17 Paragraph 2, John F. Settel is reported --
18 NBA Buffalo franchise brought in by Ned Frank; moves on
19 rapidly. Carl Scheer is president and Eddie Donovan is
20 general manager. This is a limited partnership and we
21 will look for substantial peace of mind. Our targets
22 will be wealthy people with high incomes who could find
23 a tax shelter. In the history of NBA franchises this
24 should prove to be applicable to our venture, a sub-
25 stantial capital gain at the end of five years.

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2 THE COURT: You have no objection?

3 MR. MANDEL: No, your Honor.

4 MR. SHAW: March 17, 1970: Leo Stern is
5 still on the executive committee as well as Charles H.
6 Gross and various other persons.

7 Paragraph number 4: It was decided to in-
8 vestigate the practicality of withdrawing from our 1 New
9 York Plaza committment. Andrew Newburger will start the
10 ball rolling by communicating our desire to the attorney
11 who has been handling the matter.

12 Paragraph number 5: --

13 THE COURT: Again, there is no proof of an
14 offer made by Atlas to Gross to get out.

15 MR. SHAW: We lost money in February. No
16 firm figure yet.

17 MR. MANDEL: That's not probative of anything.

18 MR. SHAW: Only with respect to the --

19 THE COURT: Sustained.

20 MR. SHAW: Paragraph 3: Leo Stern still a
21 member. Charles Gross is talking to new parties regarding
22 subordinated capital. We will now pay three percent on
23 value of securities in new subordinated accounts. It will
24 take four percent at the NYS limit.

25 The rest is unimportant.

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MR. MANDEL: I do not think that's relevant.

MR. SHAW: Only that during this period Mr. Gross was talking to people with respect to their subordinated capital without, I believe -- I don't know if the record establishes this. I am not positive. He did not reveal to them the financial condition of the business.

THE COURT: Objection sustained.

MR. SHAW: April 7, 1970, paragraph 7: Leo Stern still on the executive committee.

We are attempting to raise approximately one million dollars of subordinated capital. This is not necessary for our operations, but will look good ratio-wise.

I think it is relevant, your Honor, that almost nine months before Mr. Aixala came in and added one million dollars to the subordinated loans, Newburger Loeb had begun its efforts to do the same thing, all unsuccessfully.

MR. MANDEL: I don't think that is relevant.

THE COURT: I will allow it to stand.

MR. SHAW: I think we can indicate that through May 12th Leo Stern was a member of the executive committee although on May 12th he was absent. He has been a member every single month since some time in

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2 January. I believe the testimony establishes the tra-
3 ding account that was reopened.

4 MR. MANDEL: It shows he is absent from
5 the meeting.

6 MR. SHAW: During the meeting on May 19th.

7 MR. MANDEL: For whatever it is worth.

8 MR. GRUTMAN: Not much.

9 MR. MANDEL: Absent May 19th and May 12th.

10 MR. SHAW: May 26, 1970, paragraph 5: A
11 lengthy discussion was held of our desire to raise ad-
12 ditional capital. Our target is one million dollars.

13 Same as before.

14 THE COURT: I will accept that.

15 MR. SHAW: June 11: A general discussion
16 was held on the desire and need to raise additional
17 capital. On this happy note we adjourned.

18 THE COURT: I will take it.

19 MR. SHAW: June 18, 1970, paragraph 1:
20 Operations normal.

21 Paragraph 5: Charles Gross is leaving for
22 California Wednesday to discuss possible dissolution of
23 N.L. Bracker associates.

24 MR. MANDEL: I don't think that's probative
25 of anything, your Honor.

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THE COURT: Sustained.

MR. SHAW: Paragraph 6: Progress report
in 250 Park Avenue, sub-paragraph d: It was found that
recovery on furniture and fixtures in the three offices --

I think this supports Mr. Ragusin's view
that when you close one brokerage firm you try to sell
your furniture and fixtures and recovery is at a minimum.

THE COURT: I will sustain this.

MR. SHAW: Minutes of July 21, 1970: Leo
Stern still on the executive committee. Ned Frank ab-
sent.

Paragraph 3: Charles Gross reported that we
are having a problem with loans at our banks collateralized
by security selling under tender. An effort to alleviate
this condition it was decided that certain things would
be done.

THE COURT: Objection sustained.

MR. SHAW: August 12, 1970: Members of the
executive committee include Leo Stern and Ned Frank, as
well well as Fred Kayne.

Paragraph 2: New business. Notice of fine.
New York Stock Exchange requires that a copy of its cen-
sure of Newburger be placed in the hands of all capital
contributors. Charles Gross and Robert Newburger were

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2 given the responsibility to implement.

3 I think it is relevant here, as Mr. Rubin
4 indicated, that he was not advised of the censure, even
5 though he was a capital contributor.

6 THE COURT: I will take it.

7 MR. MANDEL: Note my objection, your Honor.
8 This is not related to any of the issues of this case.

9 MR. SHAW: Charles Gross resigned the po-
10 sition of managing partner. Fred Kayne was appointed
11 managing partner.

12 The record indicates that the executive
13 committee was Robert L. Newburger in addition to the
14 persons already referred to, Andrew Newburger, Charles
15 H. Gross, Fred Kayne, and Robert F. Therese.

16 THE COURT: I will take it.

17 MR. SHAW: Minutes of the executive com-
18 mittee, October 9, 1970: It was explained to the com-
19 mittee that the purpose of Mr. Persky's presence at that
20 meeting was to answer any questions that might arise with
21 regard to partnership agreements or any other questions
22 pertinent to the business of the firm and/or the partners.

23 Paragraph 1: Charles Gross. Mr. Gross
24 resigned effective September 30, 1970. The New York
25 Stock Exchange and the American Stock Exchange have

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asked for clearance, and Heine & Company have requested a release from Mr. Gross. It is the opinion of counsel that an amendment to the agreement is required in order to confirm Mr. Gross' release from the non-competitive clause.

Mr. Kayne took a preliminary survey of the present partners which indicated that an amendment could not be approved at this time.

MR. MANDEL: That says "partners present."

MR. SHAW: You are right. Ned Frank is responsible for drafting a reply to NYSE and Heing & Company.

MR. MANDEL: No objection.

MR. SHAW: Minutes of October 16, 1970: Charles Gross is a registered representative of Newburger Loeb. The executive committee agreed to allow Charles Gross to be a registered representative for Newburger Loeb.

MR. MANDEL: I'm not voicing an objection.

THE COURT: I will take it.

MR. SHAW: In addition to topic number four under new business, the executive committee agreed to allow Charles Gross to be a registered representative for Newburger Loeb provided he signed a proper document assuring that the contractual rights of Newburger Loeb

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in relation to Charles Gross would not be prejudiced.

THE COURT: I will take it.

Is that it?

MR. SHAW: There is a reference to G, and it says: As Charles Gross has not yet responded, the matter has not been resolved.

G is evidently the proposal that he be a registered representative.

THE COURT: Let's not get into that.

Is there anything else?

MR. SHAW: Paragraph 7: This is executive minutes of November 21, 1971.

MR. MANDEL: 1970.

MR. SHAW: Gross' employment. Ned Frank brought up the question of Charles Gross' AD 12 form, the form to be filed with the New York Stock Exchange.

Parenthetically I am merely stating the object of this being filed with the NYSE states that Gross had indeed done nothing wrong. The forms also say that Bob Therese also objects.

Bob Newburger noted that after Bill McGovern signed his form it was given to Bob Persky to hold in case it should be deemed proper to file it. Bob Newburger had discussed the matter with Fred Kayne who said he saw

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2 no reason not to.

3 Robert L. Newburger had asked Paul Risher
4 his opinion. Risher said that Gross could not use this
5 as leverage. Bob Newburger would tell Bob Persky that
6 there is an objection to the form being filed.

7 Paragraph 10 --

8 It is obviously 1970 even though it says
9 1971, your Honor.

10 It was decided that C.H.G. get football
11 tickets and life insurance and \$500 loan should be charged
12 to his capital account.

13 MR. MANDEL: I object to that. That doesn't
14 prove anything.

15 MR. GRUTMAN: I offer it on the issue of
16 good faith since those happen to be specific items in the
17 pleadings. Your Honor has indicated a disinclination to
18 hear proof on that. It shows there was good faith in
19 the assertion of those claims.

20 MR. MANDEL: That doesn't prove good faith.

21 MR. GRUTMAN: It proves that the lawyers
22 didn't insert sham claims.

23 MR. SHAW: It shows the level of the fidu-
24 ciary relationship existing between these parties at
25 that time.

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2 THE COURT: I will permit it by itself to
3 stand.

4 MR. SHAW: Robert L. Stern said, "We must
5 present a plan to convince the limited partners we can
6 eventually run the firm profitably."

7 MR. MANDEL: What does that mean?

8 MR. SHAW: Just a financial condition of
9 Newburger Loeb.

10 THE COURT: Objection sustained.

11 We are now where we have had weeks of testi-
12 mony on this.

13 MR. SHAW: I have nothing further.

14 MR. MANDEL: Do you rest?

15 MR. SHAW: Yes.

16 THE COURT: Do you have something to read?

17 MR. GRUTMAN: I have something to say. I
18 was following and Mr. Shaw pre-empted me.

19 THE COURT: I take it you are finished?

20 MR. GRUTMAN: I rest, your Honor.

21 THE COURT: You rest?

22 MR. MANDEL: I have motions, your Honor.

23 THE COURT: Before we get to your motions
24 let me go back to Mr. Aixala.

25 Mr. Mandel, is there anything beyond the

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2 legal attribution of Persky's knowledge to Mr. Aixala
3 that would justify holding him in this case?

4 MR. MANDEL: That and the fact that he
5 signed a false affidavit are the only things on which
6 Mr. Aixala could be held.

7 THE COURT: I don't see that that's a
8 basis for holding him, so I will dismiss the claim against
9 Mr. Aixala. Let's go, Mr. Mandel, to your motions ad-
10 dressed to Mr. Shaw.

11 MR. MANDEL: With regard to the counter-
12 claims asserted in the reply --

13 MR. GRUTMAN: Before you do that, I thought
14 I was here as a defendant. I have no affirmative --

15 THE COURT: What I meant, your affirmative
16 defense here has been concluded, such as you wish to
17 put in.

18 MR. MANDEL: Before I go on with regard to
19 these motions, your Honor, specifically no responsive
20 pleadings were required as your Honor may recall, and I
21 said to your Honor earlier in the case that we should be
22 deemed to have the benefit of denials on all affirmative
23 defenses.

24 I would like to put on the record that with
25 regard to the first counterclaim in the reply which has

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2 to do with unauthorized trading, we asserted in addition
3 to denials the defense of ratification, and I now move
4 to dismiss that counterclaim on the ground that there is
5 not a prime facie case. All that is before the Court is
6 Mr. Rubin's testimony that Gross kept him, told him to
7 keep this trading secret, so that the partners would not
8 panic.

9 We have affirmative evidence that the part-
10 ners learned of the trading not later than, I think the
11 testimony was, May and that no action was commenced on
12 this at any time by the partnership. There is no evi-
13 dence of any demand having been made by the partnership
14 upon Mr. Gross and the evidence is that even after this
15 litigation was started by the corporation that particu-
16 lar claim was not asserted until some lengthy period
17 after.

18 THE COURT: I will reserve decision on that.

19 MR. MANDEL: With regard to the second
20 counterclaim and reply, that is the so-called Atlas claim---

21 MR. SHAW: I will consent to the dismissal
22 of that.

23 THE COURT: That's dismissed.

24 MR. MANDEL: With regard to the third counter-
25 claim, that is the assertion that Gross' responsible for

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2 the \$50,000 Stock Exchange fine against the firm, there
3 is no evidence to indicate that Gross is personally re-
4 sponsible for that.

5 THE COURT: Mr. Shaw?

6 MR. SHAW: The only proof with respect to
7 that, your Honor, if I may attempt to marshal the proof,
8 is that Mr. Gross signed the special operating question-
9 naire during the summer of 1969 wherein he stated that
10 there was one or zero differences or breaks in the record
11 with respect to the differences between the numbers of
12 stock they should have and were holding for customers and
13 those they actually had on hand. In fact, it subsequently
14 appeared that the differences were quite substantial and
15 out of this developed the censure of the firm, \$50,000.

16 THE COURT: Let me stop you a minute. Can
17 you direct my attention to any proof that Mr. Gross either
18 knowingly made a material misrepresentation or permitted
19 these SOQ's knowing they were false?

20 MR. SHAW: There is the inference from the
21 testimony of Mr. Therese that shortly after Mr. Gross
22 became a partner in Newburger Loeb he knew that he had
23 been "screwed". Subsequently, in September, he realized
24 that there were these breakes or learned these things
25 definitely in the course of the Peat, Marwick audit.

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1 I think Mr. Gross, it can be inferred, knew or should
2 have known of the condition of Newburger Loeb, of which
3 he was a partner and became a managing partner at the
4 time he was the managing partner, and that there is at
5 least an inference that when he made the statement he
6 knew what it was or what the facts were. After all,
7 the statement is a certification of something, and where
8 it is proven to be false, I think that there is a prime
9 facie case that the person making the statement is re-
10 sponsible for the falsity of it. I do not think it is
11 necessary in a case such as this to prove intent to
12 conceal or guilty knowledge, or anything similar to that.
13 I think the mere making of the statement is sufficient.

14 THE COURT: I will dismiss that claim.

15 MR. MANDEL: The fourth counterclaim asserted
16 in the reply --

17 MR. SHAW: I consent to the dismissal of
18 that, and the same with regard to the fifth counterclaim.

19 MR. MANDEL: The sixth counterclaim --

20 MR. SHAW: I consent to that.

21 THE COURT: What about the counterclaim
22 with regard to Donahue?

23 MR. ROTHMAN: That's an assertion of the
24 original complaint.
25

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2 MR. SHAW: Your Honor, it is the clearing
3 agreement claim as well; it is not an attorney claim.

4 THE COURT: How can you do that? I re-
5 member reading that in my chambers and wondering how
6 you could put her name in there and relate it back to
7 the original pleading.

8 MR. GRUTMAN: She was not a party.

9 THE COURT: Without giving her an opportu-
10 nity to answer or anything else.

11 MR. GRUTMAN: That was an anomaly. She
12 originally had no standing at all before the Court. She
13 was not a party. She probably --

14 THE COURT: Mr. Mandel, what do you say to
15 this? Do we treat her as named in the original complaint
16 and allegations are denied?

17 MR. MANDEL: I brought her into the case. I
18 guess she is here.

19 THE COURT: All right.

20 MR. GRUTMAN: That was the difficulty with
21 Mr. Gelb. We didn't think he could have been brought
22 into the case.

23 THE COURT: At some point I ruled she was
24 in.

25 Mr. Mandel, you are therefore only having

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2 to meet the unauthorized trading, so we will recess
3 until tomorrow morning. I take it it would be ap-
4 propriate to do that since we would have recessed in
5 five or ten minutes.

6 MR. GRUTMAN: Your Honor said yesterday
7 when I raised the question about concluding arguments
8 and motions already made before the Court, and motions
9 to be made at the conclusion of all the evidence, that
10 you would speak to us about that today. I have very
11 strong feelings about wishing to make some motions
12 orally at the conclusion of the evidence.

13 THE COURT: Let me ask you this: Mr. Mandel,
14 as I recall, has three announced witnesses. Can we make
15 our time schedule?

16 MR. MANDEL: Yes.

17 THE COURT: Will we make our time schedule
18 with enough time to permit reasonable argument?

19 MR. MANDEL: If the cross examination does
20 not take longer than the direct, we will have no problem.

21 MR. SHAW: We will agree to do that. We
22 will limit ourselves just to the time involved in the
23 direct.

24 THE COURT: I will see you all at ten o'clock
25 in the morning.

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MR. SHAW: Insofar as Mr. Aixala is concerned, I would not want to waive my right to move now that he has been dismissed to the entry of a judgement in his favor dismissing the complaint and also awarding him costs and any disbursements which he may have in this case.

THE COURT: I do not think you waive that in any event.

MR. SHAW: As well, your Honor, the fact that he has been brought into this very enormous conspiracy case. I think on very small grounds I would like to, at some point, move for an award of attorney's fees in Mr. Aixala's behalf.

THE COURT: Mr. Shaw, I will not grant attorney's fees. He was the most modest of your clients, requiring no more than two hours on the stand, and I doubt if there was much involved in packaging him along with --

MR. SHAW: This is for Mr. Aixala. It is not for me.

THE COURT: My present thinking is that I would not grant such a motion.

MR. SHAW: I am not foreclosed from making it, am I?

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THE COURT: You are not, but I suggest given my present thinking, I am not favorably inclined. I held him in for quite some time because I wanted to know how the total picture developed because I had some concern as to whether he should be in or out. I do not think that attorney's fees would be justified but I am not going to foreclose you from any motion you might want to make.

I reserve the right to change my mind if you were to forcefully persuade me to the contrary.

(Time noted: 5 o'clock p.m.)

- - -

1 rg/lf/1

2 NEWBURGER, LOEB & COMPANY, INC. et al

3 vs.

71 Civ. 685

4 CHARLES GROSS, et al.

5 August 1, 1975
6 10:00

7 (Trial resumed)

8 MR. MANDEL: Mr. Esterman, please.

9 I would like to reassure the Court this won't take
10 long.

11 THE COURT: All right.

12 L E S T E R E S T E R M A N, called as a witness
13 on behalf of Defendant Robert S. Persky, having been
14 first duly sworn, was examined and testified as follows:

15 THE COURT: Mr. Esterman, as I said yesterday with
16 regard to Mr. Abrams, obviously if there is anything that
17 touches upon or prejudices your client's interest here you
18 are to speak up.

19 THE WITNESS: I will inform the Court. I don't
20 believe it will.

21 THE COURT: All right.

22 MR. GRUTMAN: Just a moment.

23 MR. SHAW: Shouldn't we have an offer to determine
24 whether this is so.

25 THE COURT: Well, I asked Mr. Abrams yesterday whether

1 rg/lf/2

2 he was aware of anything that he is going to be asked that
3 touched upon his client's interests and I have done the same
4 with Mr. Esterman here.

5 MR. SHAW: There is a problem here, your Honor, because
6 Mr. Esterman -- I think we should approach the bench on this
7 and we can do this off the record?

8 MR. MANDEL: I don't think so.

9 THE COURT: There is no jury here.

10 MR. SHAW: Mr. Esterman, to my knowledge, not only
11 represents Mr. Persky but represents to a certain degree the
12 interests of an insurance carrier.

13 THE COURT: As I remember the canon that I looked
14 at yesterday -- I didn't bring it with me again --

15 MR. MANDEL: He is being called by the opposite
16 party.

17 THE COURT: He is being called by an adverse party
18 who would be required to testify without jeopardy to his position
19 as long as what he testifies to does not -- I have forgotten
20 the exact language.

21 MR. GRUTMAN: Be prejudicial to the interests of his
22 clients.

23 MR. SHAW: How can that not be the case when he is
24 called by the other side unless Mr. Mandel is suddenly going to
25 bring in evidence that favors Mr. Persky.

1 rg/lf/3

2 THE COURT: Mr. Esterman, are you aware of what area
3 you are going to be asked about?

4 THE WITNESS: If Mr. Mandel is going to limit his
5 inquiry to the one question he asked me about, which relates
6 to a statement he made in court --

7 THE COURT: That's what I expected you were going to
8 testify to and if it is that I can see no reason that anybody
9 couldn't be called who remembered the statement being made.

10 MR. SHAW: If it's a statement made in court why
11 don't we just have Mr. Mandel say it and we will stipulate it.

12 THE COURT: No, we will take his testimony so it is
13 in the record. All right.

14 THE WITNESS: Your Honor, that's my understanding
15 of what the interrogation will be.

16 THE COURT: I expected as much. Go ahead.

17 DIRECT EXAMINATION

18 BY MR. MANDEL:

19 Q Mr. Esterman, you have been an attorney in this
20 case for some years, is that correct?

21 A Yes.

22 Q Were you present on one occasion when I made a
23 certain statement in open court before Judge Owen in connection
24 with the possibility of cross claims against Finley, Kumble
25 in this case?

1 rg/lf/4

Esterman-Direct

2 A I was present when you made a statement. If you
3 want to refer to the statement more specifically I will be
4 able to give you my response.

5 Q Yes. Do you recall which motion that was?

6 A My recollection is I believe it was the motion when you
7 were attempting to include as parties, additional defendants,
8 some of the additional partners in the Finley, Kumble firm.
9 That's my best recollection.

10 Q What is your best recollection of the statement that
11 I made?

12 A I believe you stated that if there were to be any
13 cross claims brought you would prefer that they be brought
14 promptly so as not to delay the trial of this action.

15 Q Do you recall that I said also --

16 MR. SHAW: Objection.

17 MR. GRUTMAN: Objection as leading.

18 THE COURT: Is that the extent of your recollection?

19 THE WITNESS: That's it to the best of my recollection.

20 THE COURT: Then at this point you may lead.

21 Q Do you recall that I said also that in my opinion
22 this case called for the assertion of such claims by certain
23 of the parties?

24 A Mr. Mandel, I do not recall that in that framework
25 or that statement. I do recall you saying that you prefer they

1 rg/lf/5 Esternan-Direct

2 he brought, if they were to be brought, because you didn't

3 to delay the trial.

4 MR. MANDEL: Nothing further.

5 MR. SHAW: I just have a question.

6 CROSS EXAMINATION

7 BY MR. SHAW:

8 Q Can you recall the fact that I was in court that
9 day?

10 A I believe you were, yes.

11 Q I believe that this was an occasion when a member
12 of the Abrams firm, a younger man was in court that day --

13 A That's right.

14 Q Who has not appeared in this case.

15 A That's right. I don't know his name, but I believe
16 that's true.

17 Q Can you recall that that younger man stood up in
18 court that day and said in substance that it was not the in-
19 tentation of the Abrams firm to make a cross claim?

20 A Yes, yes. That was so.

21 Q And that it had been considered that they had
22 decided not to do so?

23 A Well, I don't know if they used that language, but
24 in substance that was what was said.

25 Q Can you recall the fact that I stood up that day, too?

1 rg/lf/6

Esterman-Cross

2 A You may have, but I just don't recall what you said
3 at that time.

4 Q Does it refresh your recollection that on that
5 occasion I indicated that I had not intended on behalf of the
6 person, persons or corporation that I represented or any one of
7 these entities to bring a cross claim either?

8 A I remember that all of the lawyers present, other
9 than Mr. Mandel, of course, indicated one way or the other
10 that they did not intend to bring such claims. Now, whether
11 it was said in the language you used, of course, I just don't
12 recall that.

13 Q And the claims for malpractice against Finley, Kumble?

14 A Yes. That was the posture of the discussion.

15 Q And did the attorneys indicate that they had con-
16 sidered the matter but had decided not to do so?

17 A Well, in substance they did. I don't know the
18 language.

19 Q Do you have any information whatsoever with respect
20 to whether these attorneys who indicated that they were consider-
21 ing the matter had been prompted by something Mr. Mandel may
22 or may not have said to them to consider the matter?

23 A No. Not at all.

24 MR. SHAW: No further questions.

25 THE COURT: All right.

1 rg/lf/7

Esterman-Cross

2 CROSS EXAMINATION

3 BY MR. GRUTMAN:

4 Q When Mr. Mandel made the statement about wanting the
5 trial of the case brought on as quickly as possible, do you
6 remember the remark about which he has reminded you having
7 been coupled with a statement that in the event that the
8 Finley, Kumble additional partners sought to be added as named
9 defendants wanted further and separate discovery would oppose
10 that?

11 A The language against was not quite that way. I
12 believe what was said was something to the effect that Mr.
13 Mandel I think believed that all of the facts that had
14 already been discovered had applied to him and brought out
15 and, therefore, there would be no need for discovery since the
16 facts would be available to him by reason of the discovery
17 already had, something to that effect.

18 Q Was that said in connection with his desire that
19 if there were a cross claim it not delay the trial of the
20 case?

21 A Oh, yes. That's what he wanted.

22 Q Lastly, Mr. Esterman, in any conversation that you
23 had with Mr. Mandel or any statement that he made in open
24 court, did he ever disclose to you that he had privately
25 importuned the law firm representing the partners or the law

1 rg/lf/8 Esterman-Cross

2 firm representing the corporation and suggested that they
3 make a claim in malpractice against Finley, Kumble?

4 A No, no, he had not.

5 MR. GRUTMAN: No further questions.

6 THE COURT: Anything further?

7 MR. MANDEL: Nothing further.

8 THE COURT: Thank you very much.

9 (Witness excused)

10 MR. MOSS: For the record, let the record show the
11 young attorney in our office is Donald Richenthal, Donald
12 Arthur Richenthal, and he is an associate in the office.

13 MR. MANDEL: I offer as Defendant's EEEEE for
14 identification letter of transmittal dated April 29, 1974,
15 from Mr. Roth to me in which is enclosed a letter of April
16 25th of 1974 to a large number of additional defendants in
17 the plaintiff in this case. This is with reference to Mr.
18 Abrams cross examination where he did not remember a certain
19 letter. Your Honor may recall.

20 THE COURT: Yes.

21 MR. GRUTMAN: No objection.

22 MR. SHAW: No objection.

23 THE COURT: Thank you.

24 (Defendant's Exhibit EEEEE received in evidence.)

25 MR. MANDEL: I offer as Defendant's DDDDD a copy of

1 r3/f/9

2 the amended certificate of limited partnership of Newburger,
3 Loeb and Company, Inc., together with the county clerk's
4 certification that it has been filed. You recall this came up
5 in connection with the examination of Mr. Bamberger.

6 THE COURT: The statement is made in it that everybody
7 has agreed to the transfer?

8 MR. MANDEL: All of the partners.

9 THE COURT: I will receive it on that basis.

10 MR. SHAW: Dated February 11, 1971. This is the
11 amendment of the certificate of limited partnership which I
12 offered as having been filed. In other words, the file copy
13 which Mr. Mandel objected to, I would think if this goes
14 in, what I have offered should also go in because it amended
15 the file copy with the county clerk. Does your Honor recall
16 this document?

17 THE COURT: It is part of the closing papers.

18 MR. SHAW: No.

19 MR. MANDEL: Yes.

20 MR. SHAW: There is a partnership agreement, your
21 Honor, and there is also a certificate of limited partnership
22 which was filed with the county clerk which I offered as one
23 of my early numbered exhibits. Although the partnership agree-
24 ment was received, that certificate was not received. I
25 think that that certificate should be received if this certificate

1 rg/lf/10

2 is received.

3 MR. MANDEL: I recall what Mr. Shaw is talking about
4 and perhaps I can refresh the Court's recollection. When
5 there was a question of what was the partnership agreement
6 Mr. Shaw offered the abbreviated version that is filed with
7 the county clerk and on the question of what is the partnership
8 agreement your Honor ruled that that version is not relevant,
9 that the full version speaks for itself. What I am offering
10 now is just a change of name, but it's labeled "Amended
11 Certificate of Limited Partnership."

12 MR. SHAW: It amended Plaintiff's Exhibit 119 for
13 identification which was not received in evidence.

14 THE COURT: In terms of its name.

15 MR. SHAW: Correct, your Honor.

16 THE COURT: And the purpose of it is not to show
17 that there was an amendment, but to show that it recites that
18 all the partners signed it and Mr. Mandel wants me to draw
19 certain inferences from that statement, is that what you are
20 saying?

21 MR. MANDEL: Yes.

22 THE COURT: That is the purpose of it.

23 MR. MANDEL: Mr. Bamberger notarized it.

24 MR. ROTH: If I may, the document Mr. Mandel proffers
25 is in evidence as part of the binder. What this DDDDD adds

1 rg/lf/11

2 is the filing mark with the county clerk.

3 MR. SHAW: If it's already in evidence, your Honor,
4 I have no objection.

5 THE COURT: All right, it's received.

6 MR. SHAW: I reoffer 119 on the theory of complete-
7 ness.

8 THE COURT: That's still irrelevant.

9 (Defendant's Exhibit DDDDD received in evidence.)

10 MR. MANDEL: Mr. Gross, please.

11 C H A R L E S H. G R O S S, resumed.

12 THE COURT: Mr. Gross, you are still under oath.

13 MR. MANDEL: Your Honor, Mr. Gross is on for rebuttal
14 and also for defense to the remaining counterclaim asserted
15 in the reply.

16 THE COURT: All right.

17 FURTHER DIRECT EXAMINATION

18 BY MR. MANDEL:

19 Q Mr. Gross, what was the date of your resignation or
20 retirement from Newburger, Loeb and Company; what was the date
21 on which it was submitted?

22 A I gave notice of withdrawal on August 31, 1970,
23 effective September 30, 1970. I was no longer a partner after
24 September 30th.

25 Q It has been brought out that when you withdrew you had

1 rg/lf/12 Gross-Direct

2 not advised Miss Bleich or Mrs. Donoghue or anybody else to
3 withdraw, is that a fact?

4 MR. SHAW: I'm sorry.

5 A No, I am certain that Miss Bleich, who was on
6 the premises, knew of my withdrawal as a partner.

7 MR. SHAW: Objection. I move to strike.

8 A I obviously would no longer --

9 MR. SHAW: Objection, your Honor.

10 THE COURT: What's the basis for the objection?

11 MR. SHAW: He is not responding to a question. He
12 is merely saying -- he was asked whether he advised and he is
13 beginning to say, "I am certain she knew."

14 THE COURT: No, he said she was on the premises.
15 Let's hear what his answer is.

16 A I am certain that I told her I had withdrawn and
17 would no longer be a partner. I spent very limited, if any,
18 time on the premises -- I spent some time on the premises in
19 the month of September before my actual ceasing to be a partner
20 was effective. I cannot testify as to when precisely I told
21 my sister -- she was a resident of Australia -- but I know
22 that she was informed.

23 Q But you had not advised either Miss Bleich or Mrs.
24 Donoghue to withdraw, did you?

25 MR. SHAW: Objection. Leading.

1 rg/lf/13

Gross-Direct

2 THE COURT: Well, he is addressing the testimony to
3 a witness that Mr. Grutman called and under these circumstances
4 I will let him focus on the subject matter in any event.

5 A No, I had not.

6 Q Now, would you tell the Court why you did not?

7 A Well, it has many facets. Firstly, I had not withdrawn
8 for the purpose of destroying and creating a capital run on
9 Newburger, Loeb. I withdrew because I felt that the situation
10 after Mr. Kayne became managing partner -- in fact before he
11 became managing partner, from the time he became evident in
12 the first Monday of August was hostile, intolerable, and Mr.
13 Kayne was conducting himself as certainly in relation to
14 any conversations I had previously with him in bad faith.

15 Secondly --

16 MR. SHAW: I object, your Honor, and move to strike
17 out --

18 THE COURT: Strike out the bad faith. The hostility
19 will stand.

20 MR. SHAW: Correct.

21 A I would like to say Mr. Kayne was not living up to
22 the understanding he was having with him.

23 MR. GRUTMAN: Objection.

24 MR. SHAW: Your Honor, that is not responsive to the
25 question.

1 rg/lf/14 Gross-Direct

2 THE COURT: Sustained. Mr. Mandel, you will have
3 to go at this by what happened so I can draw that conclusion
4 if it is justified.

5 Q We will leave that where it is. I am more interested
6 in --

7 MR. GRUTMAN: I object to what Mr. Mandel is interested
8 in.

9 THE COURT: I will permit him to do it that way. If
10 he doesn't want to explore it he doesn't want to explore it and
11 we will go ahead.

12 A Further I did not think at that time that Newburger,
13 Loeb was in the kind of jeopardy that has been represented in
14 this courtroom that it was in and any jeopardy and problems
15 that it did have were mostly involved by the withdrawal of
16 Newburger, Loeb from the clearing business which had been
17 affected during the period of September of that month. Probably
18 arranged it early in September and perhaps even late in August.
19 Therefore, Newburger, Loeb had more than sufficient capital
20 as a nonclearing firm. My own personal estimate was that the
21 general partnership capital left, from the balance sheet I
22 had seen up to that point and knew about, was three-quarters of
23 a million to \$900,000.

24 Q Now let me interrupt.

25 MR. SHAW: Wait a minute, the witness is answering

1 rg/lf/15 Gross-Direct

2 the question as to why he didn't tell these people.

3 MR. MANDEL: Yes.

4 MR. SHAW: Why should he be interrupted.

5 THE COURT: I didn't think he was.

6 Q I want to interrupt for one second to clarify a
7 point. When you say that the general partnership capital was
8 of a certain dimension, does that include money owed by the
9 general partners?

10 MR. SHAW: Objection. Leading.

11 THE COURT: No, overruled.

12 A No. I am talking of the capital that was in the firm
13 at that time. Money owed by partners was expected to be paid.
14 Partners had contributed money in the spring of the year.

15 MR. SHAW: Objection, your Honor. This is not
16 responsive to any question, it is just a speech.

17 THE COURT: Yes, it is. Let's just get an answer
18 instead of interrupting.

19 A Money had been contributed by partners in the spring
20 of the year in the amount of quite a few of hundreds of thousands
21 of dollars from their tax returns. I recall, incidentally, that
22 Mr. Andrew Newburger contributed his tax return. Mr. Robert --

23 Q The tax refund.

24 A The tax refund, I am sorry.

25 THE COURT: This is in '70?

1 rg/lf/16

Gross-Direct

2 THE WITNESS: In the spring of '1970.

3 A Mr. Andrew Newburger, Mr. Robert Newburger, Mr.
4 Robert Stern, I believe Mr. Leo Stern and certainly Mr. Charles
5 Gross had all contributed money and there was never any ques-
6 tion in my mind that their monies would be forthcoming.

7 Q Did you have any other --

8 THE COURT: You were giving reasons why he didn't
9 tell Bleich and Donoghue. Please, let's finish that answer.

10 Q Did you have any other reasons besides the two you
11 have mentioned up to now why you did not tell or advise Miss
12 Bleich and Mrs. Donoghue to withdraw from the firm?

13 A Because of these reasons I did not think that their
14 investment was in any imminent jeopardy or, in fact, any
15 jeopardy at all.

16 Q Do you have an opinion as to what caused the
17 deterioration of the situation of Newburger, Loeb and Company
18 by November and December of 1970?

19 MR. SHAW: Objection.

20 MR. GRUTMAN: Objection.

21 THE COURT: On what ground?

22 MR. GRUTMAN: On the grounds that he wasn't there
23 and that it would be selfserving. It is incompetent and self-
24 serving.

25 MR. SHAW: I also believe opinion testimony, unless

1 rg/lf/17 Gross-Direct

2 it is being offered by an expert is irrelevant. It is like
3 state of mind proof.

4 THE COURT: Yes. There has to be some showing, but
5 he is closer to the situation than an absolute stranger.

6 MR. MANDEL: I think your Honor has already accepted
7 Mr. Gross in prior testimony as an expert in connection with
8 this business because of his experience in the brokerage
9 business and because he was the managing partner of the
10 business.

11 THE COURT: I did, but Mr. Shaw raises the question
12 that after sometime in August or September 30th when he was
13 no longer there --

14 Q Did you acquire knowledge of the occurrence of
15 certain events --

16 A I did.

17 Q After the time when you left.

18 A I did.

19 Q And based on such knowledge --

20 MR. SHAW: Objection, unless it is specified.

21 THE COURT: What events did you learn of?

22 THE WITNESS: I learned of the withdrawal notices
23 of limited partners at the same time I learned that the New
24 York Stock Exchange had sent Newburger, Loeb and Company a
25 warning notice because of potential withdrawals of capital and

1 rg/lf/18 Gross-Direct

2 I had a conversation with Mr. Fred Kayne probably in the
3 latter part of the month of October in which he told me of
4 certain things that he was doing.

5 THE COURT: All right, go ahead.

6 Q Will you state what Mr. Kayne told you.

7 A I inquired of Mr. Kayne, whether he had made any
8 progress with the proposed purchase of assets that he had
9 submitted to the Newburgers and Sterns and which he had spoken
10 to me and Mr. Golenbock about, from Mr. Persky's company, at
11 Mr. Golenbock's company a month or so previous and Mr. Kayne
12 said he had not made any progress. He found it impossible to
13 deal with it, but that there were various ways in which
14 pressure could be put on and among those ways was the hiring
15 of registered representatives, paying them what was known then
16 as guarantees -- in other words, if you took a registered
17 representative from another firm and hired him you sometimes
18 paid a guarantee which was in lieu -- in a cost function --
19 of putting a new registered rep in training program. It was
20 considered worthwhile to do and you paid a guarantee of perhaps
21 six months, half of his earnings or his full earnings
22 annualized, but for six months or something like that and he
23 told me that he planned and was hiring salesmen on that basis
24 and most of these guarantees would be applicable as expenses
25 in 1970 and the real benefit of income would come in 1971, and

rg/lf/19

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1 he said that there were other plans in which the
2 expenses of the firm, the costs would be realized in 1970
3 and the benefit would accrue to a succeeding year. I had no
4 personal stake in this because 1970 was the end of mine and
5 I represented it and I said to him at the time -- I mean, I
6 had a personal stake. I said to him at the time, you know,
7 that I am going to suffer from that and it was sort of, "I'm
8 sorry, but these guys can't run the firm and shouldn't be
9 allowed to and I want to run it and I want to take it over."
10 This is one of the things that contributed to my state of mind
11 when I felt very strongly that the capital did exist, would
12 exist in the event of liquidation and I also, of course,
13 had the feeling at the meeting of August 24th that I intended
14 that Mr. Kayne conduct the meeting of September 23rd --

15 MR. SHAW: Your Honor, I object. We are going from
16 September back to August.

17 THE COURT: Sustained.

18 Q Mr. Gross, did you become aware of the resignation
19 of Mr. Kayne's withdrawal from the firm?

20 A I did not become aware of it until probably a month
21 or so, maybe even less, but some period of time, a week or
22 maybe up to a month after it occurred, but I did become aware
23 of it.

24 Q Did you become aware of other resignations of partners
25

1 rg/lf/20

Gross-Direct

2 which occurred just at about the time of Kayne's resignation?

3 A Well, I became aware that Kayne and Sloane and Frank
4 resigned concurrently. I also learned that Settel followed
5 them out, you know, within days or just a couple of weeks.
6 Torres also followed them out and those were the only
7 significant resignations of management personnel, management
8 type personnel that did occur because the Newburgers and
9 Sterns did stay and Mr. Roggenburg was a customers' man in
10 the branch office and he left at the end of December, but, you
11 know, I didn't think that was significant.

12 Q Do you have an opinion as to whether these
13 resignations had something to do with the deterioration of the
14 possession of Newburger, Loeb and Company?

15 MR. SHAW: Objection.

16 THE COURT: Yes. I will permit you to ask him if he
17 has an opinion and what it is based on.

18 Q Do you have an opinion as to whether these --

19 THE COURT: No, do you have an opinion as to what
20 happened to Newburger, Loeb and why.

21 Q All right. Do you have an opinion as to what happened
22 to Newburger, Loeb and why?

23 A Newburger, Loeb was stripped of its management
24 personnel that were partners. The Newburgers and Sterns at
25 that time professed themselves or behaved as not being capable

1 rg/lf/21 Gross-Direct.

2 I believe of managing the firm and the firm was I thought left
3 in default to and, therefore, the interest
4 of the firm -- the interests of the partnership, let's put
5 it that way, were no longer the interests of management and I
6 was aware of reorganization and incorporation proposals and
7 purchase proposals of the assets and I have an opinion very
8 distinctly that the persons running the firm were not necessarily
9 running the firm for the benefit of the partnership, but were
10 running the firm for the benefit of the eventual takeover of the
11 assets of the partnership, as I believe was being done just
12 prior to their taking over.

13 MR. SHAW: I move to strike that and I move to strike
14 out everything after the opinion.

15 THE COURT: Strike that last clause out.

16 Mr. Gross, your answer to Mr. Mandel's original
17 question -- his original question was what do you attribute the
18 decline of Newburger, Loeb in the fall of '70 to and your
19 answer, in essence, is that it was stripped of management
20 personnel and I take it, also, capital.

21 THE WITNES: The management was stripped and it was
22 all part of a preordained plan.

23 THE COURT: Strike the preordained plan, but in any
24 event your reasons for that were there were resignations of
25 partners with, I take it, prospective capital loss and the loss

1 rg/lf/22 Gross-Direct

2 of management personnel, is that right?

3 THE WITNESS: One thing, your Honor, was the fact
4 that many limited partnership withdrawals occurred after my
5 resignation, notices of withdrawal.

6 THE COURT: That's what you told me. You told me
7 that already and that was one of the fact s.

8 THE WITNESS: That was one of the factors and the
9 loss of management personnel among partners.

10 THE COURT: Prospective personnel and loss of
11 management among partners.

12 THE WITNESS: That's right.

13 Q Mr. Gross, I direct your attention to the period
14 in late January and the first part of February of 1971, and
15 ask whether you were in contact with Miss Bleich during that
16 period.

17 A Very limited. We might or might not have had a conver-
18 sation. If we had conversation about the affairs of Newburger,
19 Loeb I would expect it was very, very minimal.

20 Q Were you in contact with Miss Bleich's attorney,
21 Mr. Silverman in that period?

22 A Yes.

23 Q What was the frequency of that contact?

24 A Well, the frequency of the contact -- well, are you
25 talking about the latter part of January and early February?

rg/lf/23 Gross-Direct

Q And early February.

A Reasonably frequent both alone and with you, Mr. Mandel, with Mr. Silverman in which I, and I think successfully, convinced Mr. Silverman --

MR. SHAW: Objection.

THE COURT: Sustained. Strike out the word "successfully."

A I attempted to convince Mr. Silverman that Newburger, Loeb was not in the straights that had been represented to him, that it would be in in the event of a liquidation and that I told Mr. Silverman that my opinion, an opinion which I hold to this day, is that as long as Newburger, Loeb was in capital compliance -- in other words, as long as the limited partners and subordinated lenders of Newburger, Loeb extended their notices of withdrawal for 30 or 60 days or whatever it might be, but they certainly would have been given perhaps as much as two months or three months and maybe even longer, the New York Stock Exchange would not close them down. The New York Stock Exchange had no reason to close down a firm in capital compliance. I am aware of a letter --

MR. SHAW: Objection. I move to strike, "I am aware." This is a conversation with Mr. Silverman I understand, something he communicated with Mr. Silverman.

THE COURT: Why don't you finish the conversation with

1 rg/lf/24

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2 Mr. Silverman.

3 Q Yes.

4 A I believed then and tried to convince Mr. Silverman
5 that in the event of an orderly liquidation of Newburger,
6 Loeb and in view of the deficits owed by general partners, the
7 precise sizes of which I did not know, and the values that
8 were seemingly accruing to at least one of the in-kind securi-
9 ties at that time and my personal faith was very great in one
10 or two more of them, the limited partners would come whole
11 from a liquidation and I convinced him of my reasons for my
12 counsel to Jeanne Donoghue not to go along.

13 MR. SHAW: Your Honor, I object and move to strike
14 all of this except if it is offered solely for the purpose of
15 establishing what the communication with Mr. Silverman was as
16 opposed to the truth of the underlying fact. I think that we
17 are trying to get in in a sideways way this person's
18 testimony with respect to the fact that what Mr. Ragussin
19 says, what other people says behaved upon facts as their
20 opinion is his opinion rather than just a conversation that he
21 had with Mr. Silverman. I think that's improper if it goes
22 in for any other purpose. Am I making myself clear?

23 THE COURT: It's admissible for the conversation with
24 Mr. Silverman, but why isn't it admissible as his opinion just
25 as we have had the opinion of all sorts of others, lawyers,

1 rg/lf/25 Gross-Direct

2 partners, limited partners, subordinated lenders, all of whom
3 have said I believe this, that or the other. Why isn't it
4 equally admissible on the same basis?

5 MR. SHAW: Because this witness does not lay a founda-
6 tion for his opinion. When it comes in this way there hasn't
7 been establishment of the foundation so it's difficult, if not
8 impossible, to cross examine him on the validity of the opinion
9 reached.

10 THE COURT: You may cross examine and, as a matter
11 of fact, under the new rules can't an expert give an opinion
12 without giving any facts to back it up?

13 MR. SHAW: That's correct.

14 THE COURT: No, I will permit this under these cir-
15 cumstances.

16 MR. MANDEL: I should also note, your Honor, that
17 Mr. Gross' opinion --

18 THE COURT: These are all matters of weight, Mr.
19 Shaw, among other things. It is not a question of admissibility.

20 MR. MANDEL: Mr. Gross' opinion is already on the
21 record from his prior testimony. We are now going into the
22 conversations with Silverman and myself.

23 THE COURT: Go ahead.

24 Q In your conversations with Mr. Silverman and myself
25 were there discussions about the essential nature of the

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2 proposed transfer agreement?

3 MR. SHAW: Objection, your Honor. I don't see how
4 relevant that is, the conversation that he had with his
5 attorney prior to the commencement of this lawsuit.

6 THE COURT: No, this is with Silverman.

7 MR. MANDEL: Yes.

8 MR. SHAW: Or even with Silverman, your Honor.

9 THE COURT: No, as I understand the questioning of
10 Miss Bleich was intended to draw the inference for me that
11 Mr. Mandel --

12 MR. SHAW: All right, I withdraw it, your Honor.
13 You are right.

14 THE COURT: All right. Go ahead.

15 A You, Mr. Mandel, and I had discussed --

16 Q Just tell what we discussed with Mr. Silverman.

17 A I wanted to say we had discussed and we discussed
18 with Mr. Silverman the proposition that this transfer was
19 illegal from two points of view, if I recall, and that is from
20 the standpoint that if Jeanne Donoghue alone did not go along
21 you felt it would be in violation of the partnership law and,
22 secondly, from the standpoint of what -- the phrase you used
23 was bribes, the bribe being offered to general partners in con-
24 sideration of their giving the business to other people, the
25 bribes in the nature of forgiveness.

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2 Q Did you discuss with Mr. Silverman the nature of
3 what Risher and Muh and Kayne were getting in connection with
4 what they were paying?

5 A I believe I previously testified they were getting,
6 and we discussed with Mr. Silverman that they were getting the
7 use of many millions, I think eventually it became something
8 over five million dollars of assets to work and manipulate --
9 I don't mean manipulate majoritively, for the benefit of making
10 their fortunes on an investment that was in the nature of one
11 percent of the assets that they would control.

12 Q I direct your attention now to the meeting of February
13 8, 1971, at Golenbock and Barell. Did you attend that meeting?

14 A I did.

15 Q Was Mr. Silverman there?

16 A He was.

17 Q Before that meeting did you have any assurance from
18 Miss Bleich or Mrs. Donoghue that they would accept any proposal
19 or compromise that you and Mr. Mandel and Mr. Silverman might
20 be able to work out?

21 A Absolutely not.

22 Q Will you describe the basis of the negotiation on
23 behalf of the three, yourself, Bleich and Donoghue, as you
24 understood it?

25 A Yes. By that time, starting in the very later part of

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January after you became active, your first activity was I think January 15th when Mr. Persky visited with us, with Mr. Risher and Mr. Muh. You started to work closely with Mr. Silverman. Of course, we felt that there was an affinity of interest and one of Mr. Silverman's clients at least, my sister Jeanne Donoghue, I had I think convinced that this deal was not in her interests and she had relayed that to Mr. Silverman and we were working together, you and Mr. Silverman were working to see if a deal could be made, an arrangement could be made and then we would first have to see whether we could have an acquiescence as among the three of us as to whether it would be equitable. There was no way in which I could bind my sister or Mabel Bleich to anything that I agreed to. There was no way I would have presumed to have tried to bind them, but if something could have been worked out among the three of us and if I was hopeful that -- well, first let's say if I was hopeful that something could be worked out it might be a basis for making an agreement subject to working it out and if something could be worked out, fine, we could make an agreement with the other parties.

Q Now, I believe it has been suggested that you were to get all of the cash that could be obtained by negotiation for Gross, Bleich and Donoghue. Is that suggestion accurate?

A No. There was no agreement that I would get all of

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this cash. There was no more than a hope on my part that I might be able to borrow some of the cash if it was paid nominally to a limited partner. I think in discussion it was referred to as being paid to Jeanne Donoghue, that I might be able to borrow some of that cash and use it because much of Jeanne's money had come from my successors in Gross and Company and I hoped that I could convince her to lend me some of that money and I could then conduct business and pay back and maybe give her an interest in what I had.

Q But there was no advance deal and no advance assurances, is that correct?

A Absolutely so.

Q You were present, Mr. Gross, were you not, during the testimony of Mr. Ragussin?

A Yes, sir.

Q Will you please tell the Court if there are parts of Mr. Ragussin's conclusions or opinions or estimates with which you disagree and start, if you will, with his omission of the sums owed by general partners.

MR. GRUTMAN: Is your Honor still accepting Mr. Gross as an expert competent to testify on this because I feel even on the issue of admissibility --

THE COURT: Isn't this something that you developed from him on cross examination?

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2 MR. GRUTMAN: That is exactly right.

3 MR. MANDEL: With Ragussin on cross?

4 THE COURT: Yes.

5 MR. MANDEL: Yes.

6 THE COURT: Didn't you bring out all this on cross,
7 he left this out and that out according to your view?

8 MR. MANDEL: Yes.

9 THE COURT: Do we need to reinforce that?

10 MR. MANDEL: I will only go into one aspect in that
11 event because Ragussin -- that's the question of the ability
12 to sell off branch offices I think Ragussin said it could be
13 done --

14 THE COURT: He said that schedule had been made
15 assuming you couldn't and he acknowledged that certain offices
16 could be and he wasn't aware that one had and I remember
17 generally the nature of that testimony.

18 MR. MANDEL: I would like very quickly to get from
19 Mr. Gross a quantitative opinion as to what could have been
20 realized on the sale of branch offices, if you have such an
21 opinion.

22 MR. SHAW: All branch offices or one?

23 MR. MANDEL: All.

24 MR. GRUTMAN: I will object to that on the basis
25 that Mr. Gross does not have any experience in this and on the

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2 basis that the testimony through Mr. Risher was that they
3 attempted to sell off branch offices and could not sell one.
4 That's evidence that's in the record before you so far.

5 THE COURT: They did sell one.

6 MR. GRUTMAN: They did sell one four years later in
7 1974. It was the Century City, California, office which was
8 sold off.

9 MR. SHAW: To Bear Stearnes.

10 MR. GRUTMAN: Now, what happened in 1974 --

11 THE COURT: But is there any showing they tried to
12 sell off the Century City office in 1971?

13 MR. GRUTMAN: Yes. My recollection of the testimony
14 was that Mr. Risher said they made efforts to sell offices
15 in 1971 and they did not. None were sold. There were arrange-
16 ments that were made -- they attempted mergers, they attempted
17 various transactions. But they could not.

18 THE COURT: That's a little different than a sale.

19 MR. GRUTMAN: The only sale your Honor has is a '74
20 sale which I think is so far removed from what the facts were
21 generally in the industry and particularly with this company
22 in 1970 and '71 that it is not competent proof. Even out of
23 Mr. Gross.

24 THE COURT: Let's see before we get to that what Mr.
25 Gross knows about selling offices and what he knows about the

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2 period. That was a very, very unsettled period in Wall Street.

3 MR. MANDEL: Yes, and may I just note for the record
4 that whatever Mr. Risher's testimony may have been, we are not
5 bound by it, it is only a question of weight.

6

7 THE COURT: All right, let's find out what Mr. Gross
8 knows.

9 Q Mr. Gross, do you know anything about the sale of
10 branch offices?

11 A I do, sir.

12 Q And what is the basis of your knowledge?

13 A Well, whereas I have not sold a branch office I
14 certainly have attempted to purchase a branch office personally
15 and the other basis is my knowledge and acquaintanceship with
16 prominent senior partners of Wall Street firms who had bought
17 and sold branch offices.

18 MR. SHAW: That's hearsay.

19 Q Are you aware of the details?

20 MR. SHAW: I move to strike on a hearsay basis.

21 THE COURT: No, this is a statement of his experience.
22 Again, going to the weight and we haven't yet gotten to the
23 point where he has got a really good basis for knowing what we
24 are talking about because it is a question of the timing as
25 well.

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2 MR. GRUTMAN: And the specific circumstances.

3 Q Now, did you attempt to purchase one or more than
4 one branch office?

5 A I made a serious attempt to purchase the branch office
6 of McDonald and Company in September, 1969, the branch office
7 then located in Century City, California. We further entered
8 into negotiations subsequently to purchase what -- my best
9 recollection was a McDonald office in Newark.

10 Q When was that?

11 A Oh, that was later. That was, I think, in the
12 spring of 1970. Perhaps late spring.

13 Lastly, although not as a going office we did purchase
14 the --

15 Q Who is "we"?

16 A We, Newburger, Loeb. We did purchase the lease and
17 the premises of the office at 250 Park Avenue from Eastman
18 Dillon and Company.

19 MR. SHAW: Can we have the date?

20 THE COURT: When did you purchase that?

21 THE WITNESS: I believe we assumed the lease --

22 Q When, Mr. Gross, was the question.

23 A I am putting it to my mind. I would say definitely
24 that we assumed the lease in August of 1970 and negotiated
25 probably in about June, maybe even as early as May.

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2 Q Do you have an awareness of the terms of other sales
3 of branch offices which occurred about 1970 or 1971?

4 MR. SHAW: In New York City.

5 A Well, when McDonald and Company went out of business
6 many of their branches were purchased by Shearson, Hammill and
7 Baensch and Company. In the case of Baensch and Company in
8 particular it was Baensch's policy, and I have been told that
9 they did pay to McDonald -- besides the assumption of leases
10 and related liabilities to the office, they did pay to McDonald
11 some discounted amount of their leasehold and furniture and
12 fixture improvements in the office, their purpose being that they
13 preferred to have that payment on their book to amortize
14 rather than goodwill payments. Further, the amount that they
15 paid was a function of the desire of Baensch and Company to
16 have that particular office or the value that they thought that
17 office would have for them.

18 In the case of Shearson, Hammill, the purchasers of
19 offices of McDonald, including the one that we tried to buy
20 in Century City that later was transferred to Shearson, Hammill,
21 that was done I know for the assumption of leases and other
22 attendant liabilities to the office, communications equipment
23 and data retrieval equipment and things of that nature and I
24 believe again there was always at least a nominal sum paid
25 for -- in actual cash that might or might not have varied,

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2 I don't know the precise nature of the deal.

3 Q Paid for what? I don't think you finished the
4 sentence.

5 A It was always attributable to furniture and fixtures.

6 Q And the leases were assumed, is that correct?

7 A Leases and other liabilities attendant to the office
8 were assumed.

9 Q When you negotiated to try to buy a McDonald branch
10 what did they ask for?

11 A They didn't ask, Mr. Mandel, we offered.

12 Q What did you offer?

13 A We were desirous of having that office.

14 MR. SHAW: That is in 1969?

15 THE WITNESS: September, 1969.

16 A We were desirous of having that office and we had
17 an estimate of what it would cost us to create our own office
18 which eventually we did and we offered \$150,000 and were pre-
19 pared to go to \$200,000 at that time for that office and that was
20 subsequent to our having first entered into negotiations with
21 Mr. Sloane and having met at one point and addressed the personnel
22 department, the personnel of the offices and having Mr. Sloane's
23 assurance that most of that producing personnel would come with
24 us.

25 Q When you say you offered \$200,000, do you mean that --

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2 A Mr. Mandel, we offered a little less. We were
3 prepared ourselves to go that high.

4 Q That was in addition to assumption of the lease, is
5 that correct?

6 A Oh, yes. We couldn't occupy it and call it Newburger,
7 Loeb office and having someone else paying the lease.

8 Q You did not get that?

9 A No. McDonald at that time apparently changed, or
10 so what is informed to me, a Mr. Paul McDonald, if I am not
11 mistaken -- McDonald, A.L.D., was in management of the firm
12 at that time and they apparently at that point had drawn back
13 somewhat on their willingness to dispose of individual branches
14 which had been part of the reason Mr. Sloane had come East,
15 so he had told me, and subsequently what they did was sell
16 packages. I think they sold four to Baensch, five to Shearson,
17 so many to someone else, but they sold packages except for the
18 few that they could not sell.

19 Q Based on your knowledge, do you have an opinion as
20 to whether Newburger, Loeb would have been able to dispose
21 of branch offices together with personnel and leasehold furniture
22 and fixtures?

23 MR. SHAW: At what time and in what place?

24 Q In the first half of 1971.

25 MR. SHAW: In New York City? Manhattan?

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2 MR. MANDEL: Whatever they were.

3 MR. SHAW: Aren't these offices only in Manhattan?

4 MR. MANDEL: No, Century City is in California.

5 MR. SHAW: Excluding that one.

6 A Newburger, Loeb had four producing offices at that
7 time, starting in the fall of 1970 -- interestingly, coincidentally
8 with Newburger, Loeb going out of the clearing business, the
9 volume of trading on Wall Street increased substantially from
10 what it had been in the first nine months of the year and
11 this was continuing through '71, which was a good year in
12 the Street. Most firms had through the trauma of '68, '69
13 and '70 so cleaned up their back offices that they were capable
14 of processing and handling much more in the way of commission
15 business than was being generated and it is my view, and in
16 fact knowledge, that firms were anxious to acquire production
17 because they had this capacity and it would be very cheap to
18 put added production into it. Therefore, the 72nd Street and
19 Broadway office of Newburger, Loeb, I believe, could have
20 readily have been sold and as has been testified in this
21 court eventually did become firstly the Newburger, Loeb
22 Division of W.E. Hutton and Company and subsequent to that, and
23 I believe the W.E. Hutton Division of Evans and Company.

24 Q Newburger, Loeb Division of Evans and Company, is
25 that correct?

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2 A Newburger, Loeb Division of Evans and Company,
3 correct.

4 Q How about the other offices, and Mr. Gross, without
5 being impolite we are trying to finish today.

6 A The 250 Park Avenue office on I think 47th Street
7 became subsequently -- it was a good office. It was a
8 combination of other branches that had been closed by Newburger,
9 Loeb in a concentration of them and in one office was a strong
10 production office and subsequently became the Newburger, Loeb
11 Division of W.E. Hutton and Company and for awhile Evans and
12 Company before it was closed earlier this year. The Century
13 City we know became, and which was I think a plum, became
14 the Newburger, Loeb Division of W.E. Hutton and Company and
15 then was sold for cash consideration of upwards of \$60,000
16 to Bear Stearnes and Company, and the main office, the production
17 facilities on the eighth floor and I am talking only of the
18 eighth floor of 5 Hanover Square where the main offices of
19 Newburger, Loeb were was also a strong production office with
20 probably 30 or more producers and that, too, I believe would
21 have become -- would have been readily transferred and did,
22 in fact, become the Newburger, Loeb Division of W.E. Hutton
23 and Company. I don't know whether that was ever a function
24 of Evans and Company.

25 Q Your opinion is that these offices you mentioned

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2 could have been sold as going branch offices?

3 A I am absolutely certain that the bare, bare rock
4 minimum that would have been realized from them would have
5 been the assumption of leases and attendant liabilities and
6 in my view certainly the California office and most
7 probably the 250 Park Avenue offices would have merited pay-
8 ment for leasehold improvements and furniture and fixtures.

9 Q Mr. Gross, I now direct your attention to a certain
10 conversation with Mr. Edwin Rubin. Is that his name,
11 Edwin?

12 A Edmond.

13 Q Edmond Rubin. Will you tell us when that conversation
14 occurred and what you said and he said.

15 A The conversation occurred either in the last days
16 of June, 1969, or the very first days of July, 1969, when --
17 well, I called Mr. Rubin into my office so I might have -- I
18 didn't have an office at that time. I had a desk in Mr. Robert
19 Stearne's office, so either in the order room, in the
20 hall outside the order room or in that office. I told Mr.
21 Rubin that I was going to do some trading in the firm account;
22 that I did not think it would be proper for that to be labeled
23 Newburger, Loeb trading account or any such name; that I thought
24 it should be a numbered account; that the purpose of this was
25 that I did not think that it should be the business of order room

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2 personnel and if it got to the order room personnel it would
3 go all through the shop and maybe even upstairs personnel in
4 some instances; that Newburger, Loeb was trading what they were
5 trading and how successfully or unsuccessfully they were
6 trading and this was especially true due to the fact that
7 many of the producers of Newburger, Loeb had known me as a
8 successful trader for more than a decade. We, I think, picked
9 the designation 900 to be the title of the account, just a
10 numbered account. There were on occasion even for customers
11 of Newburger, Loeb numbered accounts previously --

12 MR. SHAW: Objection. This is not an answer, this is
13 a speech.

14 THE COURT: This is what he said to Rubin I think.

15 MR. SHAW: It doesn't sound like it.

16 Q Just stick to the conversation.

17 A Well, we discussed a way to hide it from personnel,
18 or to try to disguise it from personnel and we arrived at the
19 number 900. Rubin said, "Does this belong in the regular
20 branch office designation?" and I said, "I didn't think so; that
21 he would have to contact the back office people."

22 At that time it would have been Mr. Marshall or
23 Mr. Braunstein. I don't recall Mr. Tepper being involved.
24 He may possibly have been. I don't recall any conversations
25 with Braunstein, Marshall or Tepper.

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2 MR. SHAW: Objection.

3 THE COURT: Strike that. We are talking about conver-
4 sations with Rubin still. Just stay with Rubin.

5 A All right, and the mechanics of setting up the
6 account were left to Mr. Rubin.

7 Q At any time was this trading secret from the partners?

8 MR. SHAW: Objection. It is just a contention.

9 THE COURT: No, it is no more a contention than
10 your contention was that this is a secret trading account.
11 It is a question of what's meant by the word "secret."

12 MR. SHAW: But I didn't have a man get on the witness
13 stand saying it's secret just by saying it's secret and I think
14 it's improper.

15 THE COURT: All right, I will sustain the objection.
16 We will go on what was said and done or what was not said or
17 not done. Go ahead.

18 Q Did you speak or inform anybody in the executive
19 committee with regard to the trading that you were doing?

20 A Concurrently. I can't promise -- testify that I
21 informed them before I made the first trade, but concurrently
22 with making that trade, let's say the same day, some point
23 before or after I made the trade my partners, Mr. Stern,
24 probably Robert Newburger.

25 Q Which Stern?

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2 A Robert Stern. Mr. Richard Stern was upstairs in
3 personnel. Robert Stern was the one I shared an office
4 with at that time. Those are my partners of the Sterns and
5 Newburgers, Robert or Leo, Robert or Andrew Newburger who
6 were aware of it at that time and I traded in that -- I'm
7 sorry.

8 Q Were they aware of the first trade that you made in
9 that 900 account?

10 MR. SHAW: Objection.

11 MR. GRUTMAN: Objection.

12 THE COURT: What's the matter with that?

13 MR. SHAW: He is being asked to testify with respect
14 to what they knew. I think the only thing he can testify to
15 is what he told them or what they said to him or whether he
16 gave them a letter or received a document or something like
17 that. It is just a bald assertion they knew.

18 MR. MANDEL: I will change it.

19 Q Did you make them aware of the first trade in the
20 900 account?

21 THE COURT: Let's see what he did to make them aware.
22 You have got to come at this somehow. Go ahead.

23 A Yes, I made them aware the first day of trading.

24 THE COURT: How did you do that, Mr. Gross?

25 THE WITNESS: Your Honor, I shared an office with

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2 Robert Stern. Andrew Newburger was in the next office and
3 I am not sure, I think Leo Stern was then next and then Robert
4 Newburger. We were in what were the executive offices which
5 were the four offices in a row there. I often lunched with
6 Robert Newburger in that period of time at the stock exchange
7 luncheon club. We were in and out of each others offices
8 constantly and I can't tell you, your Honor, that I walked into
9 an office and said, "Hey, Bob, I am trading or I bought this
10 or I sold that," but I know that they were aware concurrent
11 with the event.

12 MR. SHAW: Objection. I move to strike that.

13 THE WITNESS: I know I made them aware currently.

14 THE COURT: Strike out the latter, but when you say
15 you know, what's your best recollection as to what you did?

16 THE WITNESS: Well, I have to say one other thing,
17 that the knowledge that I would trade was known in advance.
18 We had come off restriction just the week before. The restric-
19 tions were ended just the week before and there was a knowledge
20 among the executive committee partners that now we would be able
21 to trade for firm account, we would be able to expand our
22 business, we would be able to do all of the things.

23 THE COURT: Were these the subject of discussion
24 on the executive committee?

25 THE WITNESS: Precisely in the executive committee I

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2 cannot testify to, but among the partners there was subject
3 of discussion was that we would now be free to do these things
4 and this was one of my expertises.

5 MR. GRUTMAN: Your Honor, I object to this on the
6 following grounds. The partnership agreement in evidence re-
7 quires that where there is the kind of trading which is the
8 subject of this inquiry it must be specifically authorized
9 and to say as the witness does to you that people knew that I
10 was going to do this --

11 THE COURT: I am trying to keep within the confines
12 of competent evidence. You don't have to have an express
13 executive committee minute authorizing this. If he meets with
14 members of the executive committee in the corridor and it is
15 authorized at that point --

16 MR. GRUTMAN: With a half million dollars of the
17 firms assets are being used for trading, given the minutia
18 and the trivia that appears in the executive committee minutes
19 and given the requirements of the partnership agreement, I
20 think that it's a reasonable inference that if such a matter
21 of such importance were authorized or subsequently ratified
22 it could find a place more formal than in Mr. Gross' memory.

23 THE COURT: We could find that, but there is some
24 evidence in a certain direction that there is evidence in
25 another direction. I will wait and see. Now, Mr. Gross, Mr.

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1 rg/lf/45

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2 Grutman raises the legitimate objection that there has got
3 to be some specificity here as to what kinds of contacts you
4 had with these people which was the basis of your assertion
5 of authorization. Now, when you say you had discussions
6 earlier because you were coming off restrictions and you were
7 aware that that would free the firm up to trade --

8 THE WITNESS: And we did discuss that among us.

9 THE COURT: Who did you discuss that with?

10 THE WITNESS: Certainly Robert Newburger, Robert
11 Stern with whom I had so many discussions because we were in
12 the same office at the time and to a lesser degree probably
13 Andrew Newburger and Leo Stern who spent -- I don't know whether
14 at that time but he gradually began to spend only about two
15 days a week in the office. He was an older man as you are
16 aware.

17 THE COURT: And you have a recollection of speaking
18 with these men or the subject being raised with these men that
19 coming off restrictions the firm would be free for trading?

20 THE WITNESS: For trading and other things, the
21 expansion of our business in many regards.

22 Q We are only talking about trading, Mr. Gross.

23 THE COURT: Right. You say that contemporaneously
24 with making the first trades in the 900 account you spoke to --
25 certain people were made aware by you of the fact that you had

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started to trade?

THE WITNESS: Certainly. They knew I was trading.

THE COURT: What did you do in substance that made these people aware of this?

THE WITNESS: Well, as I have testified Robert Stern might have been in the room when I spoke to Mr. Rubin. I know that I told them in conversation in the course of that time that I was trading.

THE COURT: Let me stop. When you say "them," who are we talking about?

THE WITNESS: I mean the two Messrs. Stern, Robert and Leo, and the two Mr. Newburgers.

THE COURT: Robert and Andrew?

THE WITNESS: Robert and Andrew. We five were the executive committee at that time except that we had a rotating system in which we invited other partners to sit in and be with the executive committee for a period of three to six weeks, sometimes two at a time overlapping for six weeks.

THE COURT: Do you have any recollection of speaking to any of these men in terms of your trading?

THE WITNESS: Oh, yes. I was inquired of in this period of time in which there was much more limited trading.

Q At this period you mean when, Mr. Gross?

A The summer of 1969.

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THE COURT: The opening of the 900 account.

THE WITNESS: In the summer of 1969. I would be inquired of by them of how we were doing. This would be a subject of interest by my partners and I might tell them how we were doing by volunteering it or they might ask me depending upon, you know, who brought up the subject first.

THE COURT: The word "might" is a speculation, but --

THE WITNESS: The conversation did exist.

THE COURT: There were conversations --

THE WITNESS: The conversation certainly did exist.

THE COURT: On those subjects?

THE WITNESS: Yes, sir.

THE COURT: Okay.

THE WITNESS: And I do not believe they were only of my partners who knew it.

MR. GRUTMAN: I don't mean to impede Mr. Mandel -- it is like the last day of school -- but we had an understanding that cross would take no longer than direct. I notice we are halfway through the morning session and I wonder if Mr. Mandel could give us an idea of how long he will be.

MR. MANDEL: I hope to be finished in fifteen or twenty minutes. It is a question of how long the process of extracting teeth will take.

Q Mr. Gross, did you ever tell anybody to keep secret

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2 your trading activities from any members of the executive
3 committee?

4 A No, sir.

5 Q Now, the counterclaim in the reply refers to a
6 Tyco transaction.

7 MR. SHAW: Your Honor, there has been no proof on
8 Tyco and I consent to taking that out of the case.

9 MR. MANDEL: You are dropping Tyco?

10 MR. SHAW: Yes.

11 THE COURT: Very good.

12 Q Mr. Gross, is it accurate to say that after
13 September of '69 there was no further trading in the 900
14 account until February of 1970, is that correct?

15 A Yes, sir, and there was a reason for that.

16 Q What was the reason?

17 A It was really a double reason. On September 2,
18 1969, Mr. Al Rosen started to trade in joint account with
19 Mr. -- with Newburger, Loeb and Company and Mr. Rosen was pro-
20 vided with a one million dollar buying power by Newburger,
21 Loeb to operate in that account.

22 Secondly, in the first weekend or thereabouts of
23 September, I think it was September 6th, we had the previously
24 testified to back office account, the extent of the problems
25 of the back office became known. My attentions were diverted

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2 to that. Then, of course, on September 15th, because of that
3 problem, we were placed on restrictions by the stock exchange
4 and we were permitted at our request to continue a trading
5 account, but the size of the trading account would not probably
6 have permitted my trading along with Mr. Rosen, so I think in
7 the first days of September or the last days of August, when-
8 ever it was, I was closing out and did not trade again.

9 Q Until when?

10 A During that calendar year and I started trading again
11 sometime in February of 1970, again within a week or ten
12 days after being relieved from restriction by the New York
13 Stock Exchange.

14 Q When you started trading again in 1970, did you do
15 anything to make your partners in the executive committee
16 aware of that fact?

17 A Well, once again I can only testify that they were
18 aware in the same manner that they became aware of the trading
19 in July. I told them --

20 MR. SHAW: Objection. All right.

21 A I told them I bought some City Investing. I
22 think in the first day I bought something like 4000 shares.
23 I think two or three days later I sold the 4000 shares at some
24 small profit.

25 MR. SHAW: Objection, your Honor, I move to strike

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2 unless we have the identification of a person. "I told them,"
3 means nothing.

4 MR. GRUTMAN: And may we have when.

5 MR. SHAW: The first week of the trading.

6 THE COURT: "When" is established by the trading.

7 The question is who. Who did you tell?

8 THE WITNESS: Well, again, it would be --

9 MR. GRUTMAN: Was that February?

10 THE COURT: Please answer my question. Who did
11 you tell?

12 THE WITNESS: Again it would be the Newburgers, the
13 Sterns. I was asked about this trading by Mr. Ned Frank within
14 48 hours of it occurring because Mr. Ned Frank was at that
15 time a member of the New York Stock Exchange. He spent his
16 working day or the stock exchange hours on the floor of the
17 New York Stock Exchange and Mr. Ned Frank knew what went on with--

18 THE COURT: When did Ned Frank learn of this
19 account, was that in '69?

20 THE WITNESS: No, he was not a member of the exchange
21 in 1969. I believe he learned of it, but I can't testify to
22 that, but I know that within a matter of, say, two working
23 days after I recommenced trading in 1970 Mr. Frank asked me about
24 it and especially Mr. Seidel, who did the brokerage, was Mr.
25 Frank's very, very close friend. Mr. Seidel was not instructed

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2 to keep it --

3 MR. SHAW: Your Honor, I move to strike everything
4 after Seidel.

5 THE COURT: All right.

6 Q Mr. Gross, let's go to some documents. Did Newburger,
7 Loeb generate monthly statements during the year 1969?

8 A It did not, sir.

9 Q Did it start to generate monthly statements during
10 the year of 1970?

11 A Yes, sir.

12 Q Did you find any of those monthly statements in
13 your files?

14 A I did.

15 Q Did you find a monthly statement for the month of
16 January, 1970, in your files?

17 A In my file the only monthly statement for the month
18 of January was one dated March 20th -- as of March 26th which
19 gives --

20 Q Skip that. Hold that for a minute.

21 A That is for the month of January, though, Mr.
22 Mandel.

23 Q But what is the earliest statement that you found?
24 Did you find one for the two month period ending February 27,
25 1970?

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A 4524

1 rg/lf/52 Gross-Direct

2 A I found one for the two month period ended February
3 27, 1970.

4 MR. MANDEL: I may as well mark them all.

5 THE COURT: Is this a good time to recess?

6 MR. SHAW: Can we look at them during the recess?

7 THE COURT: Why don't you do that.

8 (Recess)

9 Q Mr. Gross, I show you Defendant's FFFFF for identifi-
10 cation and I ask what that consists of.

11 A These are three sets of monthly profit and loss
12 statements for Newburger, Loeb and Company, the first being
13 for the two month period ending February 27, 1970, the second
14 one being for the three month period ended March 26, 1970,
15 including the individualized monthly P & L's for January,
16 February and March and the third being the profit and loss
17 statement or statement of income for July and August, 1970,
18 with a year to date compilation.

19 Q By whom were these statements prepared?

20 A Mr. John Wagnus, the controller.

21 Q To whom were they distributed?

22 A They were distributed to the executive committee.

23 Q These documents are your copies which you have found,
24 is that correct?

25 A These are copies that were in my desk when I left

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Newburger, Loeb.

MR. MANDEL: I offer it in evidence.

MR. SHAW: When were they distributed?

Q When were they distributed?

A Oh, generally --

MR. SHAW: These.

THE WITNESS: P and L's were distributed 15 days or thereabouts after the month end. In other words, a P & L for February would be distributed probably somewhere around the 15th or thereabouts of March.

MR. GRUTMAN: I will object to the receipt of these documents unless this witness can state that the February document or the P & L statement for February was prepared at that time and not at some later time. We know that they were not prepared in the year 1969 and I believe, your Honor, that these were not prepared until sometime later in 1970 for the month of February.

MR. SHAW: It would be our contention they could not be prepared at least insofar as they refer to the gross trading account until sometime after May, 1970.

THE COURT: Let's see. Mr. Gross, let me look at these exhibits, please.

Was it the practice of Newburger, Loeb and Company to prepare profit and loss statements?

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2 THE WITNESS: Commencing with the year end statement
3 for 1969 and monthly thereafter.

4 THE COURT: What was the practice of the firm with
5 regard to the distribution of those statements? If you know.

6 THE WITNESS: Well, I know that I received it, Mr.
7 Robert Stern received it, Mr. Robert Newburger received it, Mr.
8 Andrew Newburger received it. I know that commencing the
9 time that he became a permanent member of the executive
10 committee Mr. Settel received them and it is my understanding
11 that all members of the executive committee received them
12 and Mr. Robert Newburger was charged with informing the other
13 partners of the firm on I believe a weekly basis of what
14 occurred at the executive committee.

15 THE COURT: No, I am talking about the distribution.

16 THE WITNESS: These were received by the members of
17 the executive committee.

18 THE COURT: Was it the practice to distribute this
19 in a certain way and what was that practice?

20 THE WITNESS: They were generally given to me by
21 either Mr. John Wagnus or Mr. Torres. I naturally was always
22 impatient for them and at the time they gave them to me I
23 believe they left them with the other partners.

24 THE COURT: I see, and what was the practice in terms
25 of giving them to you, fifteen days after the period end?

1 rg/lf/55

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2 THE WITNESS: Whatever time it took them to
3 generate the statement, which generally would be in the third
4 week, fourteen to seventeen, eighteen days after.

5 THE COURT: Now, the practice of Newburger, Loeb
6 was to distribute profit and loss statements as you have
7 described, is that right?

8 THE WITNESS: To the executive committee.

9 THE COURT: To the executive committee. Now,
10 FFFFFF for identification, are those profit and loss statements
11 that were distributed to you in accordance with the practice
12 that you have described?

13 THE WITNESS: They are, sir.

14 THE COURT: All right, I will receive them in
15 evidence.

16 (Defendant's Exhibit FFFFFF received in evidence.)

17 MR. MANDEL: May I call your Honor's attention to
18 the significant item on the first of them. It says, "Income
19 C. Gross Trading," and there are similar entries on the other
20 statements. This one shows, "Income Gross Trading," and it
21 spreads it out for March, February and January.

22 THE COURT: All right.

23 Q Now, Mr. Gross, what is HHHHHH for identification?

24 A HHHHHH are the minutes of a Newburger, Loeb and
25 Company partnership meeting, January 28, 1969.

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2 MR. MANDEL: I offer them in evidence.

3 MR. SHAW: May I see it? Isn't that in evidence
4 already?

5 MR. MANDEL: I don't think it is.

6 MR. SHAW: This will take a few minutes, your Honor.
7 It is two and a half pages and I have never seen it before.

8 MR. MANDEL: What I am really interested in is
9 this and paragraph four under that heading.

10 MR. SHAW: Do you mind if I read the entire document?

11 MR. MANDEL: All right. To save time I will restrict
12 the offer if you prefer or put the whole thing in.

13 MR. GRUTMAN: What's the restricted offer?

14 MR. MANDEL: The function of the various partners
15 are as follows and then read in four. Then I am going to offer
16 GGGGG.

17 MR. SHAW: No objection as to GGGGG.

18 MR. GRUTMAN: As to HHHHH which Mr. Mandel has a
19 qualified offeron, he wants to have the minutes of January
20 28, 1969, submitted showing that corporate finance, mutual
21 funds, block trading, underwritings and research, et cetera,
22 are assigned to Charles H. Gross, Benjamin H. Peyser,
23 Edward R. Holt and John F. Settel. I would have no objection,
24 providing that Mr. Mandel stipulates that the word "block trad-
25 ing" refers not to the trading of the firm but to trading with

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institutions.

MR. MANDEL: I won't stipulate. You may examine.

MR. GRUTMAN: Then I object to it.

THE COURT: Why don't you ask the witness about it.

MR. GRUTMAN: And on the further ground that that document does not modify any provision of the partnership agreement.

MR. MANDEL: Your Honor, we offer this --

THE COURT: Mr. Grutman, do you contend that there has to be a signed instrument by the executive committee authorizing this trading or would you acknowledge that if the members of the executive committee met in the washroom and they said, "Charlie, we think it's a great idea if you trade," that that would be enough?

MR. GRUTMAN: Truthfully, your Honor, as best I can answer that question, I think that the partnership agreement simply says that before anyone is authorized to trade with the firm's money there must be specific authorization from the partnership itself. I don't know whether it requires writing, but if it didn't require writing, considering what your Honor has seen of what gets into the executive committee minutes --

THE COURT: That's evidence. We discussed that before. That's just a question of evidence.

1 rg/lf/58

Gross-Direct

2 MR. SHAW: As I bored everybody yesterday by reading,
3 your Honor --

4 THE COURT: I don't gather that there has to be a
5 written authorization to Gross and if a trier of the fact
6 were to conclude that in an informal way the executive committee
7 had authorized him to do it clustered around the water fountain
8 that would be adequate.

9 MR. GRUTMAN: If that happened, but I can't concede
10 that because I don't remember. If I could look at the partner-
11 ship agreement I would be better prepared to answer your
12 Honor's question.

13 THE COURT: It just says the executive committee
14 or its designee, which would be relevant here, is further
15 authorized and empowered to make investments for the partner-
16 ship. Now, under that conceivably Charlie Gross could have
17 been authorized by his roommates and the people next door informally
18 to do it. It is some evidence to the contrary that there is
19 nothing in the minutes, but the question remains what is the
20 fact.

21 MR. GRUTMAN: There is testimony already in the
22 record that he wasn't authorized by people on the committee.

23 MR. SHAW: Leo Stern.

24 THE COURT: Leo Stern has an outburst with Mr.
25 Rubin. That's the only testimony that I am aware of.

1 rg/lf/59 Gross-Direct

2 MR. SHAW: Mr. Torres, also.

3 MR. GRUTMAN: And I think I will be able to bring
4 that out again.

5 THE COURT: Mr. Torres was not on the executive
6 committee.

7 MR. SHAW: And the two younger Sterns.

8 MR. MANDEL: Why argue the case now? We have a
9 document.

10 THE COURT: That's a conclusion for the end. I don't
11 think this is irrelevant as a matter of law because I think
12 there could have been an informal --

13 MR. GRUTMAN: Could we have my question dealt with,
14 your Honor, that block trading is a word of art?

15 MR. MANDEL: This paragraph is not restricted to block
16 trading and not offered solely for that reason. Paragraph
17 four charges Mr. Gross and some others with all of the
18 financial matters generally.

19 THE WITNESS: Income producing.

20 MR. MANDEL: Income producing matters generally.

21 THE COURT: I will admit it and you may ask him what
22 block trading means, Mr. Grutman, when it comes time to
23 cross examine. It is otherwise competent to prove its contents.

24 MR. GRUTMAN: Yes, sir.

25 (Defendant's Exhibit HHHHH received in evidence)

1 rg/lf/60 Gross-Direct

2 THE COURT: On the limited basis Mr. Mandel has
3 offered it.

4 MR. MANDEL: I now offer GGGGG which I understand
5 there is no objection.

6 MR. SHAW: No sir. That's May 11th New York Stock
7 Exchange memorandum.

8 MR. MANDEL: Right.

9 MR. GRUTMAN: No objection. It's conceded by
10 May 11th everybody knew about City Investing.

11 THE COURT: You may mark this in evidence.

12 (Defendant's Exhibit GGGGG received in evidence.)

13 Q Mr. Gross, during the period of the investments in
14 City Trading during 1970, do you remember any specific
15 conversations you had with any members of the executive
16 committee as the size of the investment mounted?

17 A I remember specifically being asked by members of
18 the executive committee and other partners whether I bought
19 more that day, whether I sold, how the stock fared that day
20 and I remember that there was discussion. Specifically the
21 words I don't remember, but there was discussion about it at
22 times in executive committee meetings.

23 Q One further matter, Mr. Gross.

24 I direct your attention to the time when Mr. Rakkind
25 told you he would not employ you as a trader. Do you remember

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2 that time?

3 A Yes, sir.

4 Q Did you make efforts after that to find other employ-
5 ment as a trader?

6 MR. SHAW: Isn't this out of the scope of rebuttal
7 and defense to counterclaim?

8 THE COURT: What does this bear on, Mr. Mandel?

9 MR. MANDEL: This has to do with the Rafkind claim.
10 Mr. Shaw put in some evidence of mitigation of damages.

11 MR. SHAW: All right.

12 THE COURT: The objection is withdrawn. Go ahead.

13 Q Did you make efforts to find other employment as a
14 trader?

15 A Well, I had other employment at the time of that.
16 I was a registered representative of Heine & Company. I
17 continued with Heine & Company --

18 Q Mr. Gross, my question is: did you make other
19 efforts to find employment as a trader?

20 A I did not. I felt that I could not. The same thing
21 would continue to happen.

22 MR. SHAW: I move to strike everything after, "I
23 did not."

24 A I did not.

25 THE COURT: All right.

1 rg/lf/76 Gross-Cross

2 space at 5 Hanover Square. All these were assumed by the
3 corporation.

4 Q Mr. Gross, among the reasons that you gave to Mr.
5 Mandel for what you thought was the decline in the fortunes of
6 Newburger, Loeb was the departure of competent management,
7 right?

8 A The departure of competent management, correct.

9 Q Are you aware that all of those people whom you
10 itemized as persons who abandoned the business were people
11 who came back into the new corporation?

12 A As employees or as stockholders?

13 Q In either capacity, Mr. Gross.

14 A Well, I am aware that Ned Frank worked as a trader
15 there for some short period of time. He lost \$25,000 in a
16 month and they threw him out.

17 MR. SHAW: Objection. I move to strike everything
18 after "trader."

19 A And I am aware of the others.

20 THE COURT: No, I will leave it stand.

21 A I am aware that Mr. Sloane continued as manager of
22 the Century City office and became a stockholder and a member
23 of the board. I am aware that Mr. Kayne became chairman of
24 the executive committee, the responsible person to the New York
25 Stock Exchange and a producer in the Century City office. I

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Gross-Cross

2 am aware that Mr. Torres had some nominal employment for awhile.

3 I am aware that Mr. Settel became the manager I think first
4 of the main board room and then 250 Park Avenue. I am not
5 sure of the precise arrangement of that. I think those are the
6 persons I spoke to and I am very aware that they all came
7 back to the corporation after having deserted the partnership.

8 Q Among the things that you said this morning, when you
9 elected at the end of August to withdraw from the partnership
10 effective September 30th, was it not an intention on your part
11 to create a run on the capital of Newburger, Loeb?

12 A I testified that not only was it not an intention
13 but that I did not suggest either to Miss Mabel Bleich or
14 Miss Jeanne Donoghue that they withdraw their capital.

15 THE COURT: Mr. Gross, just answer the questions you
16 are asked.

17 A That's correct.

18 Q When you withdrew in August you knew, did you
19 not, that Newburger, Loeb had to provide beginning in August
20 for the withdrawal of a \$200,000 limited partner and that
21 his account was required to be paid out at a rate of \$20,000
22 per month until a balance of \$100,000 remained, at which time
23 the remaining hundred thousand was to be paid out; you knew
24 that, did you not?

25 A I knew there was some limited number of limited partners

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lenders would have a right to demand the return of their capital?

MR. MANDEL: As I --

THE COURT: Sustained. What's the relevance of this?

MR. GRUTMAN: At the time Mr. Gross decided to leave --

THE COURT: In August.

MR. GRUTMAN: In August. I submit if he knew that Newburger for example had a right to collect \$97,000 as of December 31, 1970, and if he knew that the fortunes of the firm were failing, then I think that that's a relevant consideration on his fiduciary responsibility in leaving when he did and how he did and what motivations he had in mind as to what he would do if he could get out.

THE COURT: That's such a tenuous argument, it seems to me.

Q Mr. Gross, you have said that so far as your sister Jeanne is concerned you convinced her that the deal was not in her best interest.

A That's correct.

Q Did you also convince Mabel that the deal was not in her best interest?

A I testified, Mr. Grutman, that I think I succeeded in convincing Arthur Silverman. I did very limited, if any, contact with Miss Bleich as I have also testified in that period.

rg/lf/86

Gross-Cross

Q When you were convincing Arthur Silverman was it for the purpose of having Arthur Silverman convince Mabel Bleich?

A Well, certainly. I thought the deal was not in her best interest. I didn't think Mabel should go along with it, but I couldn't tell her, Mr. Silverman had to.

Q As of February 5th you know your lawyer Mr. Mandel stated at a meeting according to Mr. Silverman's notes, "It is a good working assumption Jeanne will go along if Charles Gross does and if Jeanne does Mabel will. Any deal must settle all outstanding debts and claims."

That was the state of affairs as of February 5th, wasn't it?

A And Miss Bleich, I think, testified to that same point yesterday.

Q Tell me, Mr. Gross, when you spoke to Mr. Silverman you knew that as of December 31st he had recommended to your sister that she go along with the deal, right?

A That's the reason that I used the word "tried to convince him."

Q You knew that he thought as of December 31, 1970, that the deal was in your sister's best interests and had written a letter stating just that?

A Mr. Grutman, I was aware --

1 rg/lf/87 Gross-Cross

2 Q Did you know that?

3 THE COURT: Did you know that?

4 A I believe Mr. Silverman thought that at that time.

5 THE COURT: Very good, all right.

6 Q When you convinced Mr. Silverman to prevail on Miss
7 Bleich to change her mind, was it difficult to convince Mr.
8 Silverman?

9 A Mr. Silverman is a man who makes up his own mind.
10 Yes, you have to tell him.

11 Q Was it difficult to convince him?

12 A I can't say whether it was difficult to convince
13 him. I told him over a period of time my belief. Mr. Mandel
14 subsequently joined in in telling him his belief as we estimated
15 the condition of the firm at that time and Mr. Silverman did
16 eventually agree with our thinking.

17 Q You mean it took some time to prevail upon Mr.
18 Silverman to agree with your thinking?

19 A I didn't go up to him and wave a wand.

20 Q Can you tell me one argument that Mr. Silverman
21 advanced as to why the deal wasn't in the best interests of
22 your sister or Miss Bleich?

23 A I can't tell you any arguments he advanced. I can
24 tell you that he had relied until then upon the representations
25 being made to him by Messrs. Risher and Muh and others, but

1 rg/lf/88

Gross-Cross

2 they primarily.

3 Q And you told them that Risher and Muh were unreliable?

4 A I told them that I didn't believe their statements
5 represented a true statement to the firm. I told him that
6 there were considerable tax refunds due to partners well in excess
7 of what they had agreed to pay back and that these things in
8 my view and Mr. Mandel's view were shall I say obligations of
9 the partners to the capital of limited partners and others.

10 MR. SHAW: Your Honor, I was going to go next but
11 Mr. Biehl has asked me if he could precede me and I have agreed.

12 THE COURT: All right.

13 CROSS EXAMINATION

14 BY MR. BIEHL:

15 Q Mr. Gross, you testified this morning about a conver-
16 sation with Mr. Kayne in the fall of 1970. At that time was
17 Mr. Kayne in any way responsible for the resignation of
18 any of the limited partners?

19 A I can't possibly answer that. I have always felt
20 that he was, but I can't answer that as a fact.

21 Q You had no information at that time to that effect,
22 is that correct?

23 A Specific information?

24 Q Yes.

25 A No. I have a belief that he stimulated resignations,

1 rg/lf/105 Gross -Redirect

2 event.

3 THE COURT: All right. Do you have any redirect,
4 Mr. Mandel?

5 MR. MANDEL: Really there is one thing that I think
6 I missed on, one of my last questions with Mr. Gross, I think
7 I interrupted him. I asked Mr. Gross whether after the
8 termination of the Rafkind proposal he made other efforts to
9 get work as a trader and I don't think I let him finish the
10 answer.

11 THE COURT: I think he did.

12 MR. MANDEL: He said he did not because and I stopped
13 him.

14 MR. SHAW: I objected and I moved to stop out his
15 operation because he began to say I felt and I moved to strike
16 that and it was stricken.

17 MR. MANDEL: All right.

18 MR. SHAW: He merely said he made no efforts period.

19 MR. MANDEL: Your Honor, I would like to establish with
20 the witness that there was a reason why he made no efforts,
21 namely -- I don't want to say it but I think that's legitimate.

22 MR. SHAW: Why did you not make any efforts.

23 REDIRECT EXAMINATION

24 BY MR. MANDEL:

25 Q Yes. Why did you not make any efforts to get other

1 rg/lf/106 Gross-Redirect

2 employment as a trader?

3 A I had no reason to believe that the actions of
4 Newburger, Loeb wouldn't be repeated over and over. I was
5 employed with Heine and Company as a registered representative
6 although it's not my profession, I didn't want to get into that
7 kind of a hassle any further.

8 Q When was the next date on which you secured employ-
9 ment as a trader, the next time, if ever?

10 A I think I testified September, 1972.

11 MR. MANDEL: Nothing further.

12 MR. SHAW: Nothing further.

13 THE COURT: Very good, you may step down.

14 (Witness excused)

15 THE COURT: We will take our luncheon recess until
16 2:15.

17 (Luncheon Recess)
18
19
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25

vs. 1 rg/lf/107

2 AFTERNOON SESSION

3 2:15 p.m.

4 MR. MANDEL: Mr. Settel, please.

5 J O H N F. S E T T E L, called as a witness

6 in his own behalf, having been first duly sworn, was

7 examined and testified as follows:

8 DIRECT EXAMINATION

9 BY MR. MANDEL:

10 Q Mr. Settel, are you one of the additional defendants
11 on counterclaims in this case?

12 A I am.

13 Q Did there come a time when you asked to speak
14 with me, Mr. Mandel?

15 A I did.

16 Q Were you told that I could not speak with you without
17 the written permission of your attorney?

18 A I was.

19 Q Did you procure such written permission?

20 A Yes.

21 Q Were you a partner of Newburger, Loeb and Company?

22 A I was a partner during 1969 and of a large portion
23 of 1970.

24 Q What percentage, how many points did you hold in the
25 partnership?

1 rg/lf/108

Settel-Direct

2 A Well, I had three percent of the 1969 partnership
3 and I had five percent of the 1970 partnership.

4 MR. SHAW: I'm sorry, could I have the numbers again?

5 THE WITNESS: Three percent in 1969 and five percent
6 in 1970.

7 Q Did there come a time when you became a member of
8 the executive committee?

9 A Yes. I became a member of the executive committee
10 in early March of 1970.

11 Q While you were on the executive committee were you
12 aware of certain trading --

13 MR. SHAW: Objection.

14 MR. MANDEL: May I finish the question?

15 THE COURT: What's the problem?

16 Q Were you aware of certain trading activities
17 by Mr. Gross for the firm?

18 MR. SHAW: Objection, your Honor. I think it should
19 be testimonial rather than just a conclusion.

20 THE COURT: I was going to get down to that in a
21 minute. I think this is to direct his attention to it.

22 A Yes, I was.

23 THE COURT: All right.

24 Q Were there discussions with regard to the Gross
25 trading at executive committee meetings?

1 rg/lf/109 Settlet-Direct

2 MR. SHAW: Objection.

3 THE COURT: No, overruled.

4 A I remember one discussion.

5 Q Will you state the substance of that discussion.

6 MR. SHAW: May we have the time, approximately?

7 THE COURT: You may. Mr. Settlet, can you fix the
8 time for this? You are not to be expected to be a computer
9 here, but what's your best recollection?

10 A I think the time is somewhere in late March or April,
11 sometime after I got on the executive committee.

12 Q Of 1970?

13 A Yes.

14 MR. SHAW: Late March or April?

15 MR. MANDEL: Yes.

16 Q What was the nature of the discussion which you re-
17 call specifically?

18 A The market was -- the background was, of course,
19 that we were losing money monthly; that the market volume had
20 dried up; that we were kind of hoping the market would be
21 rallying and that Charlie had just bought some more City
22 Investing and it was down in price and that if we bought any
23 more we really ought to have somebody on the board and that
24 was kind of a jocular joke, it wasn't very serious, and my
25 comment was that since Bob Newburger seemed to be the best man

1 rg/lf/110 Settel-Direct

2 for any chairman of any board that he would probably be the most
3 likely candidate for us --

4 Q To put on the board of of City Investing?

5 A Yes. It was not a serious discussion. It was kind
6 of an unhappy laugh.

7 Q Apart from this discussion that you remember,
8 specifically can you state whether there were other discussions
9 about the City Investing grading?

10 MR. SHAW: I object to that. He already testified
11 he can only remember one discussion in late March or April.

12 THE COURT: Overruled. Do you remember any other
13 discussions?

14 THE WITNESS: Not in the executive committee.

15 Q How about outside of the executive committee?

16 THE COURT: Anywhere else.

17 A I recollect long before that that Eddy Rubin had
18 mentioned to me that we were doing trading and we had a
19 position in a number of stocks, I think one of which was
20 City Investing, but that was I think in '69. It wasn't around
21 that time at all.

22 Q Were Mr. Gross' trading activities secret from the
23 executive committee at any time?

24 MR. SHAW: Objection.

25 THE COURT: Sustained.

1 rg/lf/lll Settel-Direct

2 Q In response to my request, have you looked for certain
3 records?

4 A No. Your request, you didn't ask me to look for any
5 records. The way they came about what happenstance. I found
6 records which I was not able to get about three weeks ago or
7 two weeks ago that were in Newburger, Loeb's premises at
8 250 Park Avenue when I remembered that I had two cases of
9 personal papers in the attic up there and I was able to talk
10 the management of the building into allowing me to pick up
11 those papers. I didn't know what they were, I just remembered
12 I had two cases.

13 Q Amongst your personal papers did you find any
14 monthly financial statements of Newburger, Loeb and Company,
15 Inc.?

16 A Yes, I did.

17 Q Will you please produce those statements. Will
18 you please state for the record what monthly statements you
19 have produced.

20 THE COURT: Let's do it another way, Mr. Mandel.

21 MR. MANDEL: All right.

22 THE COURT: There were distributed, I gather from
23 earlier testimony, at Newburger, Loeb certain monthly state-
24 ments, is that right?

25 THE WITNESS: Yes, sir.

1 rg/lf/112

Settel-Direct

2 THE COURT: Covering a certain period of time.

3 THE WITNESS: Yes.

4 THE COURT: These were distributed, the practice
5 was what, within two to three weeks after the period covered
6 by the statement?

7 THE WITNESS: Yes.

8 THE COURT: You are producing certain of those
9 statements that you received in the regular course of business
10 delivered to you?

11 THE WITNESS: Yes.

12 THE COURT: All right, could we mark those for
13 identification, please.

14 MR. MANDEL: May I mark them as one batch?

15 THE COURT: You may.

16 (Defendant's Exhibit IIIII marked for identification.)

17 THE COURT: You offer them in evidence?

18 MR. MANDEL: I do.

19 MR. SHAW: May we have a moment, please, your Honor?

20 THE COURT: You may.

21 MR. GRUTMAN: Your Honor, may I have a voir dire?

22 THE COURT: On what ground.

23 MR. GRUTMAN: As to when these documents came into
24 the witness' possession.

25 THE COURT: Yes, you may. I thought he had testified

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2 as to the practice of Newburger, Loeb to distribute these.

3 You may ask specifically if you wish to.

4 MR. GRUTMAN: If I may.

5 THE COURT: He said there was a practice with regard
6 to them, though.

7 VOIR DIRE EXAMINATION

8 BY MR. GRUTMAN:

9 Q Mr. Settel, in 1969 no profit and loss statements
10 were distributed by Newburger, Loeb, were they?

11 A Not that I know of.

12 Q The first time that any profit and loss statements
13 were distributed began sometime in 1970, correct?

14 A I have been told that.

15 Q Did you get all of these papers at one time?

16 A No, I did not.

17 Q Do you know when you got the first of these papers?

18 A It's my recollection that I received statements as
19 a member of the executive committee when they were published.
20 I think that those were the statements I received during the
21 time I was on the executive committee.

22 Q So these didn't come into your hands until March
23 of 1970?

24 A Well, not all of them. I would say the earliest
25 couldn't come before March. Probably not until after -- probably

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2 mid March, anyhow, the earliest one.

3 Q So the earliest that you got came into your hands
4 in mid March, 1970?

5 A It may have been.

6 Q It may have been later?

7 A No, I don't think later. I may have afterwards
8 asked for some earlier ones to compare, but --

9 Q So that the papers that you got which purport to
10 reflect what happened in January or February first came
11 into your hands about mid March, 1970, at the earliest?

12 A Yes.

13 Q And it could have been later?

14 A Conceivably, yes.

15 MR. GRUTMAN: Your Honor, I don't understand the
16 basis on which these documents come in.

17 THE COURT: I think this is to show that the
18 Charles Gross trading account is mentioned on that, isn't
19 that the purpose?

20 MR. MANDEL: Yes.

21 THE COURT: Because there was some question on Mr.
22 Gross' as to whether wasn't some alteration on it and Mr.
23 Mandel has brought a second witness for this purpose.

24 MR. GRUTMAN: I cannot see any reason that I can
25 interpose an evidentiary objection.

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THE COURT: Very well, they may be received.

(Defendant's Exhibit IIIII received in evidence.)

DIRECT EXAMINATION CONTINUED

BY MR. MANDEL:

Q Did you study these statements carefully when you received them?

A Yes, I did.

Q Line by line?

A Yes, sir.

Q Now, did there ever come a time when Robert Newburger said to you Charles Gross traded without authorization?

A No, sir.

Q Did there ever come a time when Andrew Newburger said to you Charles Gross traded without authorization?

A No, sir.

MR. SHAW: Objection, your Honor.

THE COURT: No, overruled.

Q Did there ever come a time when Richard Stern said to you Charles Gross traded without authorization?

A No, sir.

Q Did there ever come a time when Robert Stern said that to you?

A No, sir.

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2 Q How about Leo Stern?

3 A No, sir.

4 MR. MANDEL: Your witness.

5 MR. GRUTMAN: May we see the documents?

6 MR. MOSS: Just a minute, I have a few questions.

7 CROSS EXAMINATION

8 BY MR. MOSS:

9 Q Mr. Settel, on this Exhibit IIIII, did you ever note
10 on these documents the date you received the documents?

11 A No, I did not, sir.

12 Q Is there any reference in these documents to City
13 Investing?

14 A No, sir, there is not.

15 Q Mr. Settel, there has been marked as an Exhibit
16 Defendant's A, general partners Exhibit A, your notice of with-
17 drawal. Is this the notice of withdrawal you sent in?

18 A Yes, sir.

19 MR. MOSS: Your Honor, it was November 10, 1970.

20 THE COURT: I think I looked at that already.

21 Q Mr. Settel, did you attend the closing on February
22 11, 1971?

23 A No, sir, I did not.

24 Q I show you the transfer agreement dated the 31st day
25 of December, 1970, Plaintiff's Exhibit 24, and ask you if you

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Settel-Cross

2 Q And Robert Torres was present?

3 A He may have been on a rotating basis, but I don't
4 think he was a member of the executive committee at that
5 point.

6 Q And Richard Stern was present?

7 A I think the same is true of Richard Stern. I don't
8 remember him being a member of the executive committee at that
9 point. It's conceivable he was there as a member -- as a
10 rotating member. There was a rotation. In addition to
11 permanent members of the executive committee, there were other
12 partners who would come in on a rotary basis. I was one of
13 them until election as a member of the executive committee.

14 MR. SHAW: Nothing further.

15 MR. GRUTMAN: Mr. Moss has asked to ask one question
16 before me. May he precede me, your Honor?

17 THE COURT: Yes.

18 RECROSS EXAMINATION

19 BY MR. MOSS:

20 Q Mr. Settel, at the time of the closing did you have
21 a deficit capital in the Newburger partnership?

22 A Yes, sir, I did.

23 Q What was that amount?

24 A It was exactly \$59,350.

25 Q Did you deliver an assignment of your tax refund?

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Settel-Cross

A No, sir, I did not.

Q Did you discharge the capital deficit?

A Yes, sir. I paid it off in cash. By check.

THE COURT: When did you do this?

THE WITNESS: I paid it off on the date, the maturity of the note, which I think was February 10, 1974.

CROSS EXAMINATION

BY MR. GRUTMAN:

Q Mr. Settle, if we could segregate the papers that you have. I invite your attention to portions of IIIII which are papers which have been introduced in evidence and which came from your file. Now, there is a large spread sheet which runs from January through May of 1970, is that correct?

A Yes.

Q Is that spread sheet a document which you received at one time?

A Is this? I received this at one time?

Q Yes.

A I am positive that it is.

Q Very good. And inasmuch as it is a document that you receive all at one time which ends in May of 1970, would it be correct that the document was received by you at some time after May 29, 1970?

A Yes, it would be correct.

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2 cost study was made so that I could better answer your question.

3 Q I am afraid I can't assist you.

4 A I was hoping you could, but I thought the study was
5 made sometime in late May.

6 Q Of 1970?

7 A I would think.

8 Q Do you recollect whether or not while you were on
9 the executive committee you received on a regular monthly
10 basis profit and loss statements?

11 A I believe I did.

12 Q In May, starting in May of 1970?

13 A I believe I received them at the time I became a
14 member of the executive committee.

15 Q But you are not sure?

16 A I am reasonably sure about that because I would
17 have -- that's one of my things.

18 Q Now, in answering a question earlier put to you
19 about when the first mention about the City Investing by Mr.
20 Gross came up you stated that that may have occurred in March
21 or April of 1970 when, as you put it, Mr. Gross bought some
22 additional shares. Do you remember stating that to us today?

23 A Yes. I think the first time I heard about C.N.V.
24 was much earlier than that. I think it was in '69.

25 Q I am talking about in the executive committee.

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1 rg/lf/135

Settel-Cross

2 A I would think that would be reasonable. Sometime
3 in March or April. Maybe later.

4 Q I would like to show you copies of documents which
5 are in evidence and which show that in March there were no
6 purchases by Newburger, Loeb in the Charles Gross trading
7 account of City Investing; that there were --

8 MR. MANDEL: Excuse me, may I come up and look?

9 THE COURT: Yes.

10 MR. GRUTMAN: Certainly, Mr. Mandel.

11 Q There were no purchases in March of 1970 of City
12 Investing.

13 THE COURT: Go ahead. You are questioning the witness.

14 Q There were some purchases in April amounting to about
15 5000 shares, right?

16 A Yes.

17 Q But that in the month of May, 1970, there were 35,000
18 shares purchased?

19 MR. SHAW: No.

20 MR. ROTHMAN: You left out February.

21 MR. SHAW: Sixteen.

22 Q 16,000 shares purchased, correct?

23 MR. MANDEL: They say you left out February, Mr.
24 Grutman.

25 A It's possible.

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Settel-Cross

2 Q Does that refresh your recollection that the
3 earliest mention that you heard about City Investing was some-
4 time in May of 1970?

5 A I don't know whether one would say May. It's con-
6 ceivable. I think the date that I saw on that statement --
7 what is the date of the first purchase in April?

8 Q In April it appears to be -- I am not sure. I
9 think April 11th, but that's only 600 shares.

10 A Well, whatever the position, that would be sometime
11 in early April, then,

12 Q You mean they talked about 600 shares bought by
13 Mr. Gross in the executive committee or 16,000 shares, which?

14 A All I can say is that there was talk about a purchase
15 of City Investing. I don't recall the meeting.

16 Q Well, Mr. Settel, as you think back on it now,
17 wasn't the mention about City Investing brought up in the
18 executive committee about a large purchase of City Investing
19 shares?

20 A No. As I think back now I don't remember the meeting.
21 All I remember was a discussion and the discussion I remember
22 vividly because of the remark about Bob Newburger was to
23 typical.

24 Q Now, are you telling us that that came up in the
25 context of a 600 share purchase?

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A I have had conversations with Mr. Gross many, many times.

Q Did Mr. Gross ever say to you that if he won this case against you he would take your house away from you?

A Yes, sir.

Q And are you still hopeful of making a deal with Mr. Gross?

A I hope.

MR. GRUTMAN: No further questions. Thank you very much.

THE COURT: Anything further?

RE CROSS EXAMINATION

BY MR. MOSS:

Q Mr. Settel, have you got a document which shows when you were appointed to the executive committee?

A Here are the minutes which show it. Yes.

THE COURT: What is the date, Mr. Moss?

MR. MOSS: The executive committee meeting March 2, 1970.

THE COURT: March 2nd?

MR. MOSS: Yes.

THE COURT: Can counsel agree that an executive committee minute shows Mr. Settel was appointed under minute of March 2nd?

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2 MR. GRUTMAN: March 2nd.

3 THE COURT: March 2nd. We don't need to put the
4 minutes in evidence, do we?

5 MR. GRUTMAN: So it would appear.

6 THE COURT: Mr. Moss called that to the witness'
7 attention to it and I just brought that out. Anything further,
8 Mr. Moss?

9 MR. MOSS: No.

10 MR. MANDEL: I have.

11 MR. GRUTMAN: There can be no dispute about that,
12 your Honor.

13 MR. SHAW: That's it, your Honor.

14 REDIRECT EXAMINATION

15 BY MR. MANDEL:

16 Q Mr. Settlet, was the discussion at the executive
17 committee that you have referred to the first time you learned
18 of Mr. Gross' trading?

19 A No, sir.

20 Q Were you aware of the trading for some period before
21 then?

22 A Yes, I was.

23 Q Before then had you had other discussions with
24 other partners of Newburger, Loeb about that trading outside
25 of executive committee meetings?

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MR. MANDEL: Shall I start?

THE COURT: Yes.

MR. MANDEL: First I renew my prior motions and, second, I make a motion to conform the pleadings to the proof by incorporating on the counterclaim for conspiracy the bringing of all the counterclaims in the reply as part of the conspiracy, baseless because of actions asserted against my clients and also I would like to conform the pleadings to the proof, although it is not necessary, by advising the court that the ad damnum clause, prayers for damage, ought to be disregarded insofar as the pleading, the numbers should be disregarded insofar as the pleading is concerned and that the actual damages proved should be awarded.

THE COURT: Conforming the pleadings to the proof, this is something you adverted to yesterday. Against which defendants would this be chargeable? I have been thinking about it ever since you made that statement.

MR. MANDEL: It would be chargeable against every additional defendant who is charged on the conspiracy count and the plaintiff.

THE COURT: I will have to give that one a lot of thought because I think that's a -- I can see that given proper showing these cases might be -- these now dismissed cases might be included under your rubric or a trier of the

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2 fact could so find in any event.

3 MR. MANDEL: Yes, your Honor.

4 THE COURT: But as to which defendants are chargeable
5 with that conduct, that's an entirely different matter.

6 MR. MANDEL: But that's not a question with regard
7 to my motion. I make the motion with regard to all of them
8 and then your Honor decides which are appropriate in determining
9 the merits of the case.

10 THE COURT: I will reserve decision on that motion.
11 The other one is to disregard the ad damnum clause?

12 MR. MANDEL: To disregard the specific claims for
13 damages insofar as the numbers are concerned and to award
14 such damages as the proof makes proper with regard to the cause
15 of action found in our favor and in support of that motion
16 eventually, your Honor can take the motion under reservation,
17 I will give your Honor --

18 THE COURT: Some citation?

19 MR. MANDEL: Very strong authority in the Second
20 Circuit that very clearly that even where such a motion is
21 not made the trier of the fact may give larger damages than
22 are asked for in the ad damnum clause. In other words,
23 that is not considered part.

24 THE COURT: I will reserve decision on that.

25 MR. SILFEN: May I be heard Mr. Mandel's pleadings

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2 to conform the pleadings to the proof?

3 THE COURT: Yes.

4 MR. SILFEN: You may recall in one of the motions
5 submitted to you over seven weeks ago by my office, we moved
6 to dismiss the first counterclaim against the individuals
7 represented and Mr. Mandel in opposition said at some time he
8 was going to make a motion to conform that cause of action
9 to something which he then called conversion. We argued that
10 it was a 98 cause of action which was not a cause of action
11 in conversion and that only general partners who were general
12 partners of the partnership could be held responsible for a
13 violation of that first counterclaim. I just want to alert
14 your Honor to the fact that if this broad sweeping motion
15 that Mr. Mandel is making now is to try to sweep into that first
16 cause of action by some kind of a motion to amend that pleading
17 with some kind of proof, a new cause of action for conversion
18 which was never pleaded before, we resist that and have resisted
19 it in the motion which is still under advisement. I just
20 wanted to highlight that if that's what's intended.

21 THE COURT: All right.

22 MR. MANDEL: I will just say one sentence about
23 that. Our position is that that cause of action can stand as
24 it is. We say as it is. It is not an action based on a
25 statutory violation of Section 98 to which only partners would

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2 be liable.

3 THE COURT: All right.

4 MR. SILFEN: My brethren have allowed us to make
5 the motions in reverse order so if I can now be heard, I
6 will take ten minutes.

7 THE COURT: Okay.

8 MR. SILFEN: As Mr. Mandel indicated, I so indicate
9 on behalf of the additional defendants on counterclaims, Muh,
10 Sloane and Kayne, to dismiss the nine counterclaims asserted
11 in defendants' amended answer and counterclaims against
12 those three additional defendants and rather than rehash the
13 reasons why I believe that motion is proper at this time I
14 would respectfully refer your Honor to the motion which we
15 submitted before which we renewed at the end of Mr. Mandel's
16 case and which we renew again. Specifically, I would like to
17 just point out to you in the time allotted the following,
18 and if you could just follow me in the amended answer and
19 counterclaims I would like to make specific references to
20 specific paragraphs on behalf of the additional defendants
21 represented by my office. Number one, in the amended answer
22 beginning with the first counterclaim, paragraph four, the
23 proof adduced after seven weeks shows beyond any question that
24 Charles Sloane and Fred Kayne were not former partners of the
25 partnership who executed the transfer agreement on behalf of

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2 the partnership. There is no question about that. I am sure
3 Mr. Mandel will concede that neither Mr. Sloane nor Mr.
4 Kayne executed the transfer agreement on behalf of the
5 partnership.

6 Going down now to paragraph six. Conspicuously
7 absently in paragraph six is any reference to Mr. Sloane. He
8 is nowhere alleged in this first counterclaim to be either
9 a promoter or organizer of the corporation. We say, then,
10 on the basis of the testimony and on the basis of the pleading
11 and our pretrial motion and our motion made at the end of the
12 defendant's case and renewed again that there is no cause of
13 action alleged specifically against Mr. Sloane in the first
14 counterclaim. He is not mentioned and when he is mentioned he
15 is mentioned improperly.

16 With respect to Mr. Kayne, the proof shows that Mr.
17 Kayne was not a promoter of this corporation nor was he an
18 organizer within the meaning of the context of paragraph six.
19 We leave it up to your Honor to recall all of the testimony
20 about Mr. Kayne's involvement in becoming a part of this
21 corporation and say that he was not and the facts so show he
22 was neither promoter or an organizer of the corporation.
23 Mr. Muh, to the extent he is mentioned in this cause of action,
24 we say to you that we barely believe this is a Section 98
25 cause of action whatever Mr. Mandel says. He is now saying it is

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2 a conversion and we say it is not a conversation situation.

3 We say it is an accounting cause of action but then only against
4 the partners at the time of the transfer agreement.

5 Specifically with respect to the fifth defense and
6 second counterclaim beginning with paragraph 27 on page 7, we
7 say to you, sir, that the facts show that the allegations of
8 paragraph 27 are incorrect and not proven. That is to say
9 that de facto control was not given in the fall of 1970 to
10 Fred Kayne, a partner, ~~together~~ with Robert Muh and Paul Risher
11 who were managing employees of the partnership. We say to
12 you, sir, that paragraph 29 is absolutely incorrect and the
13 testimony shows that Kayne, Muh and Risher in the fall of
14 1970 did not evolve a plan to form a corporation. The testi-
15 mony shows that Mr. Kayne's proposal came sometime in either
16 August or September and that the Risher, Muh proposal came some-
17 time in November, '71, and therefore prospectively the two
18 proposals were not -- one was not related to the other and
19 they were separately conceived. The testimony shows again in
20 paragraph 29 that Kayne, Muh and Risher did not cause the
21 partnership to employ Lawrence J. Berkowitz and all of the
22 allegations of that paragraph are not true.

23 Paragraph 30 is also not true to the extent that it
24 relates to the additional defendant Kayne. The testimony
25 shows that Kayne was aware that without meaning derogatory a

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2 Cuban whose name he did not know even in December was going to
3 invest new money into this corporation and he never even knew
4 the man's name was Aixala until sometime in January and the
5 bunching of Risher, Kayne and Muh together in paragraph 30
6 is contrary to the weight of the evidence.

7 The same thing with paragraph 31. The bunching
8 together in the latter part of 1970, after Kayne had
9 already tendered his resignation of Risher, Kayne and Muh
10 and Persky, causing the partnership to substitute Persky
11 and Finley, Kumble is absolutely untrue. The proven testimony
12 shows that at the August 24, 1970, meeting on the agenda was
13 the subject of the termination of Golenbock and Barell.
14 Risher and Muh had absolutely nothing to do with that. Mr.
15 Kayne, who then was a part of the executive committee, made
16 that recommendation. So the bunching together in paragraph
17 31 is not true at all. We say, sir, that there has been no
18 showing that Mr. Muh under any circumstances did any affirmative
19 act whatsoever which would cast him in liability. On that
20 score your Honor may remember that in an early time in this
21 trial you had asked Mr. Mandel, to wit on July 17th, --
22 on what basis that he thought Mr. Muh was responsible. Mr.
23 Mandel's theory, as told to you on that date, which I would
24 not like to mull over at this time, but to hand up to you
25 because I think there is no question of what you said and what

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2 Mr. Mandel said, was that Mr. Muh was in some way responsible
3 because of acts of Mr. Persky and because of those acts they
4 were imputable to Mr. Muh. When you permitted Mr. Aixala
5 out of this case yesterday you had asked Mr. Mandel other than
6 the imputation to Mr. Aixala of anything that Mr. Muh did,
7 what else did Mr. Aixala do wrong.

8 MR. SHAW: Mr. Persky.

9 MR. SILFEN: And Mr. Mandel said something about a
10 phony affidavit and you dismissed. On the basis of the
11 imputation of anything Mr. Persky may have done we say to
12 you there is no showing affirmatively that Mr. Muh did any
13 act in conspiracy or in combination with others which would
14 cast him responsible for anything to do with the claims of
15 Gross, Bleich and Donoghue. We will make that same general
16 statement regarding Mr. Sloane. Also with respect to Mr.
17 Sloane I would like to point out to you, your Honor, so there
18 should be no question, that Mr. Sloane is conspicuously
19 omitted from the following.

20 He is not named in either the fifth, sixth or seventh
21 counterclaims and as respects to the third, fifth, sixth,
22 seventh and eighth counterclaims, as Judge Ward has already
23 held, we respectfully submit there can be no finding of
24 liability against the defendants represented by my office
25 since they have asserted no affirmative claims whatsoever in this

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2 case. We also alleged based on the proven evidence that Messrs.
3 Sloane and Kayne had more than probable and reasonable cause to
4 institute their California lawsuit at the time that they did.
5 To carry forward from 1975 of that lawsuit into arbitration
6 shows that they were not guilty of either malicious prosecution
7 or abusive proofs nor did their lawsuit become part of any
8 overall combination or conspiracy. We will address ourselves to
9 that issue of the absence of abuse of process and the absence
10 of malicious prosecution in our post trial memorandum of law.
11 We say to you, sir, that the facts show that there was not a
12 conspiracy between any of the defendants represented by my
13 office and by Mr. Biehl's office; that there was no specific
14 proof that Mr. Sloane did anything affirmatively to cast him-
15 self in liability to the Gross, Bleich, Donoghue defendants;
16 that Mr. Kayne's lawsuit and Mr. Sloane's lawsuit were brought
17 in good faith; that Mr. Sloane is conspicuously absent from
18 at least three of the counterclaims; that he is not responsible
19 under the first counterclaim because he is not specifically
20 mentioned and when he is mentioned he is mentioned in the wrong
21 fashion. So I respectfully renew all of the motions we made
22 before and ask you to find that there is no liability on the
23 defendants represented by my office for either conspiracy,
24 abusive process, a violation of Section 98 of the transfer
25 agreement or conversion.

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2 THE COURT: Mr. Silfen, I gather that you are in
3 effect urging that I grant you a directed verdict of your
4 clients?

5 MR. SILFEN: If this was an injury case I would ask
6 you for that.

7 THE COURT: I would reserve decision on that motion,
8 obviously. Thank you.

9 MR. MOSS: On behalf of the defendants, the general
10 partner defendants in the counterclaims, I move to dismiss
11 the counterclaims on the grounds previously stated at the end
12 of Mr. Mandel's case. I wish to add the following; that by
13 dismissing Aixala as one of the party conspirators, alleged
14 conspirators, there can be no conspiracy since Mr. Aixala
15 was an essential party to the transfer. Without him there
16 could never be a transfer from the partnership to the corpora-
17 tion.

18 THE COURT: Mr. Moss, I don't see that point for beans.
19 I don't think you need to waste any time on that.

20 MR. MOSS: With respect to the claim that the third
21 party transfer is void, our position is that the transfer
22 agreement was legal. In any event, assuming that the transfer
23 agreement was void, nevertheless there can be no liability
24 because Mr. Gross, Mabel Bleich and Jeanne Donoghue never saw
25 an accounting to establish what was doing under -- what was due

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2 them under the partnership. Without that stricken in favor of
3 Mr. Gross, Mabel Bleich and Jeanne Donoghue we say there can
4 be no claim for damages under this transfer agreement.

5 THE COURT: To the extent that you are moving for a
6 judgment in favor of your clients as a matter of law that is
7 denied.

8 Mr. Shaw and Mr. Grutman? Mr. Esterman?

9 Decision is reserved on that.

10 MR. GRUTMAN: Your Honor, I join in the motions made
11 by Mr. Silfen and made by Mr. Moss and I would like to use the
12 time that you have allocated not to make an ad hominem speech
13 to the court or a closing argument full of rhetoric and I
14 would begin, however, by saying to the court that I apologize
15 again for the fact that during the course of this long and
16 very difficult case I have sometimes found it straining the
17 bounds of my ability to resist making an outcry because I
18 had felt and do feel that this passion of Finley, Kumble is
19 really unnecessary. I have felt through this case, as I feel
20 now, as though my law firm has been the victim of the worst
21 of all gypsy curses, which is, "May you some day be involved in
22 a lawsuit in which you are right," and I believe that we are
23 right. It has been utterly maddening for four years, at an
24 inordinate expense to my law firm, to have to be involved in
25 demonstrating, as I believe we have demonstrated through these

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2 weeks, that the claim against Finley, Kumble is a confection.
3 It is a contrivance on behalf of someone whose secret desire
4 to find a pocket deep enough to satisfy his avaricious appetite
5 has looked to Finley, Kumble. The lawsuit was more than a year
6 and a half old at a time when the Gross defendants and Mr.
7 Mandel were aware of all of the operative facts and circum-
8 stances surrounding the transfer agreement, the role which
9 Finley, Kumble had played in working what I think your Honor
10 was the miracle of Newburger, Loeb and the role that Bob
11 Persky played, and it is no mere coincidence that Finley,
12 Kumble was named at a time when blood began to flow from our
13 law firm and when Bob Persky got into trouble. That was in
14 November of 1971 on the record now before you, your Honor, and
15 we were named on February 28, 1972. From that pile of deposi-
16 tions before you, you will see from the chronology that Mr.
17 Mandel's claim that it was the discovery that brought to light
18 something which constitutes the gravamen of his grievance
19 against Finley, Kumble that was discovered in the course of
20 that discovery before we were named is utterly untrue and that
21 the only reason that we were named is because we are the only
22 pocket from which a recovery can be had. I am sorry that
23 Mr. Gross' fortune or whatever it was went down in the
24 financial failure of Newburger, Loeb. I am regretful that an
25 unfortunate woman like Miss Bleich has found the substance of

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her capital beyond her having it recouped, but I am likewise sorry for the estate of Morris Newburger and its half million dollars and for Leo Stern and his estate for \$600,000 and for the millions of dollars and the other lives and the other fortunes that were lost, but they were lost not because of any conspiracy and not because of any wrong which my law firm played a part in doing. What your Honor has had before you is essentially the case and the teaching of Blackberg versus Weiss. This is an accounting between withdrawn general and limited partners and the partnership and simply because that accounting would produce no meaningful result to the Gross litigants they have converted and distorted and tortured the facts by juxtapositioning seemingly innocent things and attempting to impose a pattern of events that will not hold that pattern which they call a conspiracy. There are seven elements to that conspiracy. At the end of Mr. Mandel's case I argued to your Honor, and I think with legal propriety and I shall not rehearse on the record the teaching of the cases which are contained in the proposed injury charges that we submitted, that there was no breach of any fiduciary obligation to either Gross, Bleich or Donoghue and that claim fell apart yesterday when Miss Bleich told your Honor that she never relied on Finley, Kumble, we weren't her lawyers, she was separately represented, she was not looking to us any more than

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Gross or Donoghue were and if there was no fiduciary obligation to them there can be no conflict of interest.

When the Buckley lawsuit was commenced, as you heard from the testimony of Donald Schneider, there was some urgency about that case being begun because of the running of the statute of limitations. Each day that was delayed before the lawsuit began might have sliced away some portion of a recovery that properly belonged to Newburger, Loeb by reason of the statute of limitations and so the Buckley case by our law firm acting in the honorable and reputational capacity of acting as attorneys on behalf of a client brought the case in this court which properly belonged here and that case, your Honor, may have been triable only here. It was Mandel on behalf of Gross, Bleich and Donoghue who tied up the capital accounts of these people by making them the subject of the answer and counterclaims which they interposed. That is properly what happened. That was not done by Finley, Kumble. That was not done by Newburger, Loeb and I would underscore for your Honor when you consider the conspiracy to tie up and withhold these people's capital, that from the very beginning it lay with Gross, Bleich and Donoghue to compel an action for judicial dissolution of the partnership. They could have brought an action in the Supreme Court, New York County for an accounting. They could have brought an arbitration against the partnership

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2 in the New York Stock Exchange for an accounting or against
3 the corporation and a judgment against either would have been
4 binding against both and if speed was of some concern to them,
5 had the action been brought in the Supreme Court under the local
6 calendar rules within 30 days after that accounting action
7 had been placed for trial they would have received a preference.

8 THE COURT: Let me ask you, though, is that the
9 exclusive remedy? Do you contend that is the exclusive remedy?

10 MR. GRUTMAN: It is my opinion from the teaching of
11 Blackburn against Weiss, building on the 200 year old precedence
12 in the State of New York as I cited to your Honor in the
13 decision, in its most recent loss by Judge Irving Shapiro,
14 any claim of any wrong between partners affecting directly or
15 indirectly partnership affairs, the exclusive remedy is by way
16 of an accounting and you cannot bring an action for damages
17 until the accounting has been had. That is the law of the
18 State of New York. That, I believe, is correctly stated to be
19 the law of the State of New York. While we in this forum,
20 and I realize the forms of action don't rule us from their
21 graves in this court, you can see through the formal listings
22 of the somewhat jumbled pleadings here and recognize that what
23 you are really dealing with is an accounting, but into that
24 accounting Finley, Kumble has been attempted to be interwoven
25 as some kind of a conspirator and I say, your Honor, when you

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2 consider that the gist of that charge is that we, or our clients
3 held up these people's capital for this length of time by
4 litigation, the bonds of litigation which denied them access
5 to their capital were bonds in which they embroiled themselves
6 by their too artful counterclaim and too clever tactics which
7 they have used in this case.

8 Now, your Honor, briefly in the ten minutes re-
9 maining to me I wish to deal with the seven prongs of
10 the conspiracy which Mr. Mandel has contrived and argued
11 against us and I would like to do that, your Honor, in the
12 context of what the proof is and I shall briefly treat the
13 evidence from the witnesses and the documents. The first
14 claim against us is that the settlement of the partnership in
15 its claim against Buckley was manipulated in bad faith so as
16 to create a pretext for withholding funds due to the defendants.
17 The facts in this case are that the settlement in the Buckley
18 case took place before anybody ever knew that there was going
19 to be a problem with Bleich and Donoghue and at a time when the
20 organization did not require the consent of
21 Charles Gross. It is claimed that the settlement was improvi-
22 dent and yet the testimony here is that if the settlement
23 had not been accomplished Buckley would have gone bankrupt and
24 that was said by as reputable firm as Webster, Sheffield and in
25 the bankruptcy after an indeterminately period of time the anemic

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2 Newburger, Loeb firm would have had to undergo substantial
3 legal expenses and would not have fared as well as under Finley,
4 Kumble, namely a hundred percent better than Golenbock and
5 Barrell, \$40,000.

6 Your Honor has also heard from Mr. Schneider the
7 reasons why under Article 129 of the Securities Act of 1934
8 the proviant and sensible way for the matter to be disposed
9 of under any circumstances would have to have taken the assign-
10 ment from Buckley which became a part of that settlement.
11 The fact that the assignment subsequently in the light of
12 later developments became available to our client in the
13 embroilment of intertwined disputes and controversies between
14 Gross, the partnership, his general and limited partners and
15 subordinated lenders is no discredit and is no improper piece
16 of misconduct which can be called conspiratorial.

17 The second claim against us is that threats were made
18 to sue for alleged nonexistent wrongs and to involve defendants
19 in litigation for years if they did not consent to the transfer
20 agreement. Now, your Honor, you have heard a dozen lawyers
21 in this case, including men of some distinction whose eminence
22 I am sure is known to you personally. It's true Arthur Silver-
23 man, a lawyer who testified on behalf of Gross, is in reality
24 an interested witness, but Mr. Steefel, with 50 years at the
25 bar, and Mr. Bialkin with his reputation and with his standing

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2 in the community and in the bar nationally, and Mr. Abrams,
3 a former noted editor of the "Harvard Law Review" are men
4 whose testimony deserves the weight which I think it compels
5 and they said that the landscape was just simply bristling
6 with incipient litigation before Finley, Kumble was ever called
7 upon. They were the general partners in their disputes with
8 the limited partners, the limited partners and the subordinated
9 lenders and towering above it all was everybody's complaint
10 against Charles Gross. Whether that was for mismangement,
11 for defalcation, for dishonesty, for misrepresentation, for
12 whatever, there was supercharged air crackling with potential
13 conflict and what Finley, Kumble did was to attempt to find
14 that solution. It is true and Mr. Mandel had made much of
15 it, that Robert Persky has a bar sinister attached to his name.
16 I am sure Robert Persky bears that shame more deeply than any-
17 body else and Finley, Kumble has paid in sorrow for the mis-
18 fortune of Robert Persky. But I tell you on behalf of my firm
19 we are not ashamed of having had Robert Persky as a partner
20 and if there was anything in his career which he ever did and
21 of which he could be proud it is what Robert Persky did in
22 making Newburger, Loeb possible, to save the jobs of all of
23 the 150 people who were employed there and to attempt to salvage
24 70 years of family tradition and people's fortunes and the only
25 thing that stood in the way was Gross and if Gross was going to

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2 hognose it I know of no impropriety, your Honor, in asserting
3 on behalf of a client in saying if you don't do this there will
4 be litigation. That's not wrongful and that's not conspirator-
5 ial any more than it would be to send a claim letter, any more
6 than it would be to hold up a complaint and say if we can't
7 resolve this this is what's going to happen. Take it seriously.
8 That wouldn't be wrongful. And it wouldn't be wrongful either
9 to begin the litigation because your Honor has heard from the
10 testimony of Mr. Marcus, from the testimony of Mr. Ryan, that
11 whether you or that jury would have decided in favor of New-
12 burger, Loeb, that was a complaint with which our law firm
13 could properly be associated and not violative of Rule 11.
14 It had more than a color of right. It had a prima facie claim.
15 I believe it had real merit and it was not the product of
16 disinterest malevolence unmixed with any other motive which
17 led our law firm on behalf of our client to sue Gross and
18 Bleich. We didn't even sue Donoghue because we didn't know
19 about her and when your Honor questioned me at the end of the
20 case when I first moved to dismiss about the trouble, some
21 mistakes that existed in the first complaint brought in the
22 name of the partnership, misnumbering the turnover rate and
23 the ratio and not identifying Jordon, I think that when you got
24 through with the testimony of Bamberger and Schneider and Gelb
25 and perhaps even myself you could at least be satisfied to

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2 understand that while we are not always wrong there were
3 reasons for why those --

4 THE COURT: Not always right you mean.

5 MR. GRUTMAN: Well, not always right and not always
6 wrong, Judge. There were reasons for why those errors occurred.
7 They were innocent and they were not the product of any
8 conspiratorial haste to bring a baseless lawsuit against Mr.
9 Gross.

10 The third element of wrongdoing, that a valuable
11 employment opportunity of defendant Gross and Rafkind and
12 Company was destroyed is attempted to be brought under the
13 panoply of the protection of the antitrust laws. That is
14 utterly a ludicrous claim. There were no damages properly
15 attributable to it and there was nothing that Robert Persky
16 or our law firm had to do with it other than advising Newburger,
17 Loeb of what the provisions of its own partnership agreement
18 contained and giving the legal opinion that if something were
19 to be done it might require an amendment of the partnership
20 agreement, but we had no hand in depriving Mr. Gross of employ-
21 ment by Rafkind if it could be truly said that that was a
22 bona fide offer of employment.

23 The fourth element is that the conspirators would
24 go ahead with the transfer agreement with or without the con-
25 sent of the defendants and it would refuse to pay any money

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2 allegedly owed to them and then the fifth which is tied in
3 with that is that the transfer agreement was executed without
4 the consent of Bleich and Donoghue and in violation of Section
5 98 of the partnership law.

6 Your Honor, the law firm did not hold the money of
7 Bleich, Gross and Donoghue. We never had control, dominion
8 or possession of it. We gave an opinion, and your Honor has
9 heard how that opinion came to be given. Your Honor has heard
10 that not until the closing despite the difficulty that the
11 Rosenman firm was having with the opinion, was it anticipated
12 that the opinion would be withheld. Your Honor has also heard
13 uncontradicted evidence of how it came about that it was in-
14 quired if anybody had researched the problem and, of course,
15 Finley, Kumble had, and although the opinion was to be given
16 for the corporation which could have waived it since everyone
17 felt they would be more comfortable, Persky volunteered to
18 make use of his researches. The Kraft opinion was prepared,
19 it was read by sixteen other sets of distinguished lawyers,
20 including the Rosenman firm and everybody signed.

21 Now, Judge Ward has held that the view about the
22 applicability of Section 98 -- I am mindful of the clock,
23 your Honor, I am drawing to a close.

24 Judge Ward has held that the transfer was violative
25 of the rights of Bleich and Donoghue. I think if not through

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your decision, then through subsequent decisions Judge Ward's opinion will become an interesting curiosity in the law because I think that it is wrong. I think it was wrong before he rendered it. I think even after it was rendered it was wrong and even Burak said that while he would not give the opinion that reasonable men and reasonable lawyers could differ and I mean no disrespect to you or Judge Ward when I say while we held a contrary opinion and while my view now about Section 98 may be wrong, we held those views in good faith and having held them in good faith they are not actionable. Your Honor has heard an abundance of proof to that effect and not one scintilla of evidence which seriously discredits the faith of my law firm. As far as the sixth claim, the third party law firm and Mr. Persky gave a legal opinion in bad faith that the transfer agreement was improperly authorized and that the suit on the Buckley claim was brought against the defendants in bad faith, those two are tied in again together. Your Honor, you heard Mr. Ragussin. I don't think you should disregard that proof. Had the transfer agreement not gone through, the stock exchange closed down Newburger, Loeb on the day following, believe it or not Charlie Gross would have gone bankrupt and he did derive a benefit from the fact that the transfer agreement insulated him from damages and consequences more onerous than the ones that were visited upon him by the misfortune

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2 of the subsequent affairs of the concern of which he was
3 associated, but Bleich and Donoghue were not entitled to their
4 capital until six months later under the terms of the partner-
5 ship agreement and Gross was not entitled to his capital, what-
6 ever it was, until twelve months later and that was something
7 which the partnership or the corporation that assumed its
8 liabilities had to deal with at the appropriate time.

9 I speak only on behalf of my law firm. We gave
10 advice that we thought was right and proper. We think that
11 what we did was absolutely correct and impeccable and we believe
12 that there is no liability which should attach to us. Having
13 spoken for two minutes longer I will tarry but one minute
14 further, your Honor, and that is to say you have indicated that
15 you are not going to make any dispositions of this case at this
16 time and you have asked for closing briefs on a record that's
17 7000 pages long. I wish your Honor would reconsider because
18 while there may be issues here about what was the capital account
19 of Gross, Bleich and Donoghue and what amount, if any, as
20 Judge Ward put it, what damages, if any, may be owing to
21 Bleich, Gross and Donoghue, there is no conspiracy. There was
22 no unlawful combination. There was no bad faith. There is
23 no liability against Finley, Kumble and I believe that
24 your Honor now or later can come to no contrary conclusion.

25 THE COURT: To the extent that you are urging that I

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2 grant Finley, Kumble a directed verdict here I will reserve
3 decision on that.

4 MR. GRUTMAN: Very well, your Honor. I do so
5 only because I believe the only basis upon which we could be
6 held would be an absence of good faith on our part and on the
7 weight of the evidence in this case the only person who
8 attributed bad faith to us was Arthur Silverman and I think
9 your Honor will find from studying your notes that he was biased
10 and we seriously attacked his credibility and the total weight
11 of evidence of the Gross people have not sustained it.

12 THE COURT: On that alone I would have to deny a
13 motion, would I not, on the law?

14 MR. GRUTMAN: On the law?

15 THE COURT: Yes.

16 MR. GRUTMAN: Perhaps that is so, your Honor, but on
17 the ultimate decision which you will have to make, I think
18 on the facts it is quite clear.

19 THE COURT: That is an entirely different matter.

20 All right, Mr. Shaw.

21 MR. SHAW: Your Honor, I would like to renew the
22 motions made at the earlier stages of this case. In addition
23 I would like to move to conform the plaintiff's pleading to
24 conform to the proof.

25 THE COURT: What's involved in that?

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2 MR. SHAW: Well, your Honor, I think that basically
3 it is the ad damnum clause which I would like to have, as Mr.
4 Mandel alleges, include the total amount of damages that were
5 sustained by Newburger, Loeb, to wit, the deficit in the Buckley
6 account which was paid, as well as the lost profit which was
7 sustained by Buckley by virtue of the advice which he received
8 from Mr. Jordan shortly before the loss in his account was
9 sustained.

10 THE COURT: You mean you want to add a cause of
11 action for "bad advice"?

12 MR. SHAW: I want to have the cause of action for
13 churning to be considered a cause of action for fraudulent
14 mismanagement for the account.

15 THE COURT: I deny that motion.

16 MR. SHAW: Now, your Honor, first I would like to say
17 that it is almost impossible, if not extremely difficult, to
18 properly appraise the Buckley case, the churning claim, as
19 well as the cause of action on the clearing agreement in the
20 context of the accusations of conspiracy made in this case.
21 It is extraordinarily difficult for these issues to be
22 evaluated when there is constantly being questioned the motives
23 of the attorney in bringing the action in the first place. I
24 submit that in evaluating the Buckley claim there should be
25 first determined whether there is or is not a conspiracy. I

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2 think that is the first issue. It is my view, your Honor,
3 that there is no conspiracy hanging in this courtroom. If
4 the Section 98 opinion was wrong we would know it. There would
5 be laughter. It would be a matter that would be obvious,
6 immediately apparent to the attorneys in this room that there
7 was no basis whatsoever for that opinion. The proof never
8 rose to that point. There was solid, tangible reasons given
9 by Mr. Bamberger supporting the view that he took and it was
10 also the view that was sufficiently persuasive to the various
11 attorneys who were at the closing to go forward with it
12 and these attorneys weren't part of a travesty or a sham.
13 I hope the legal profession of the State of New York isn't
14 like that.

15 THE COURT: Mr. Shaw, let me stop you for a
16 minute. Are you arguing now to me that as a matter of law
17 I have to dismiss the opinion letter claim or are you just
18 sort of tickling my recollection as to things that I should
19 carry away with me here to mull over?

20 MR. SHAW: I am trying to give you the highlights of
21 my impressions about the case at this point, something to think
22 about.

23 THE COURT: This is for me to carry away, all right.

24 MR. SHAW: Exactly, your Honor.

25 THE COURT: Because if you are doing this as a matter

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2 of law I am thinking in terms of other matters that I have
3 heard that would require me to weigh them in the balance as
4 well as what you are telling me. On the other hand if you are
5 urging upon me certain things as highlights that you feel are
6 entitled to greater consideration, then we have a different
7 matter.

8 MR. SHAW: I don't think that the proof established,
9 your Honor, and here I shall address it as a question of law,
10 established even beyond the fair preponderance required to
11 submit that issue to a jury.

12 THE COURT: Which is this, the opinion letter?

13 MR. SHAW: That that prong of it was a conspiracy,
14 it wasn't, for anybody who has been added to this case, Mr.
15 Risher, for example, et cetera, that that was an objective
16 of the conspiracy, to render a baseless or sham opinion. It
17 was an interpretation of the law which lawyers arrived at
18 in a considered and reasoned fashion. It wasn't a baseless
19 matter. I can see very clearly myself how they could have
20 reached the conclusion that they did, namely that the
21 section deals with a situation where the general partners,
22 without the consent of the limited partners, want to terminate
23 the business without the consent of limited partners.

24 THE COURT: Mr. Shaw, let me put it this way. On
25 the record as it presently stands I would see enough in the

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2 record to have to submit that issue to a jury so I don't think
3 that to the extent that you are arguing that as a matter of
4 law that's out of the case, I think that's not the best use
5 of our time.

6 MR. SHAW: I view it two ways, your Honor. I view
7 it not only from the point of view of the law firm which
8 has knowledge of the law, I also view it from the point of
9 view of Mr. Risher, Mr. Muh, Mr. Sloane, et cetera, who have
10 no knowledge of the law. Where is there knowledge or awareness,
11 even if the opinion was wrong and Mr. Persky was just going
12 through an exercise that this was going on.

13 THE COURT: I am not going to debate this with you.
14 All I am saying is that if there were a jury here I would
15 submit that to a jury.

16 MR. SHAW: Your Honor, I say the same thing with every
17 other prong of the alleged conspiracy. As far as I am concerned
18 where there is what was established as going on during this
19 period of time, the issue to reorganize or to liquidate. Where
20 there are claims on various sides, the claim for a capital
21 account, a claim that reorganization is the correct thing to
22 be done, there is absolutely nothing wrong for the people if
23 they cannot reach an agreement to litigate, to say that there
24 will be litigation, to say that there will be lawsuits and to
25 carry that forth by going into court and to sue one another. It

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2 strikes me also here that there is nothing ominous or
3 indicative of a conspiracy with respect to a resort to the
4 courts, certainly nothing that Mr. Risher or Mr. Muh, the
5 people who were not attorneys, could have felt or known was
6 wrong. This can be repeated, your Honor, with respect to the
7 other aspects of the conspiracy. It is my opinion that this
8 is a contrivance; that the partners of Newburger, Loeb having
9 no money, that the corporation struggling during this period of
10 time, that it was realized that the best chance that anybody
11 had for a recovery here was to add as many parties as they
12 could. Aixala, for example, whose only legitimate purpose
13 for being in this case from an attorney's point of view is
14 that he was another name and he had a lot of money and that's
15 why he was added to the case and I think that's the pattern
16 of what has been going on here. Your Honor, I would like to
17 address myself also specifically as a highlight, and perhaps
18 something to think about during the ensuing period of time,
19 about the Rafkind claim. I think that this has been added to
20 the case with little basis. I think that there has been no
21 proof whatsoever. If Rafkind and Company was really going to
22 hire Mr. Gross I can assure you that in my opinion they would
23 have hired him regardless of the interchange of letters that
24 went on in this case. There has been no proof whatsoever as I
25 read my notes and as I remember of any threat made by Newburger.

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2 Loeb to Rafkind and Company. The only testimony as I recall it
3 is Stewart Rafkind's testimony that he spoke to Carl Rafkind
4 and a Mr. Levy and that they were against hiring Mr. Gross.
5 Now, they said that they had been advised certain things by
6 Mr. Berkowitz, but that does not prove that Mr. Berkowitz
7 made those statements. That would be hearsay insofar as Mr.
8 Berkowitz and Newburger, Loeb was concerned. There is no
9 proof other than the fact that a letter was sent calling --

10 THE COURT: Let's think about that for a minute.

11 He is a party to this action and, therefore, statements of a
12 party are admissible certainly against the party.

13 MR. SHAW: But the testimony was the testimony of
14 Stewart that Carl made a statement to him of what Mr. Berkowitz
15 said to Carl so there is no direct testimony.

16 THE COURT: That may be.

17 MR. SHAW: That is my recollection, your Honor, and
18 it seems to me that if you take that out of the case, the
19 alleged threat of litigation, if you hire Mr. Gross, and you
20 merely look at the exchange of correspondence which is true and
21 factual and correct and Newburger, Loeb will be required to
22 give or possibly it could be criticized for not giving complete
23 information, that there is no cause of action so far as Mr.
24 Rafkind is concerned.

25 Your Honor, I also add to that that I believe that

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the antitrust claim similarly falls because of what I have indicated, as well as the fact that I believe that by virtue of the constitution, the rules of the New York Stock Exchange, these communications, these statements made by a former employee are specifically by agreement between the parties deemed to be privileged.

Thank you, your Honor.

THE COURT: Thank you. I will reserve decision on the motion implicit in your statement.

MR. ESTERMAN: If your Honor please, for the record I would like to move on behalf of the additional defendant Robert Persky to dismiss the counterclaims interposed against him and I join with all the other motions that have been made today on his behalf. I would like to point out, your Honor, that in -- really, obviously when you start to go through your notes and all I think you will see, as all the others have mentioned, that what you had here was purely a business problem involving disputes between partners, created, of course, by a financial difficulty, that this partnership had become embroiled in and that was true before the additional defendants were joined in this action and I say it is true today. That's all this was and that's all that ever gave rise to this action, the fact that there was a financial problem and that people had disputes and there was hard bargaining, hard bargaining by

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2 everybody in this case. Many parties. Mr. Mandel's clients,
3 the other people. This goes on all the time in all business
4 disputes and I think it's apparent here and I think that I
5 would respectfully ask the court in viewing the facts of this
6 case to look at it in that light. I say that is what existed
7 before the additional defendants were enjoined in this case
8 and that joining them did not change that condition at all
9 and I respectfully so move.

10 THE COURT: Decision is reserved.

11 MR. SHAW: I forgot one thing. In behalf of Mr.
12 Aixala I move for a judgment dismissing the complaint for the
13 entry of judgment granting him the costs and disbursements that
14 may be taxed by the clerk and I also add to that an application
15 for attorneys' fees in his behalf.

16 THE COURT: I have already dismissed him so you may
17 enter judgment and I assume the normal costs and disbursements
18 will be taxed attributable to him. The motion for attorneys'
19 fees I deny.

20 MR. SHAW: Thank you, your Honor.

21 THE COURT: Mr. Mandel?

22 MR. MANDEL: Your Honor, I think the arguments
23 nominated as legal arguments --

24 THE COURT: They really boiled down to motions and I
25 have ruled on the motions, so to the extent that you want to put

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2 some thoughts in my head to leave with me, that's really the
3 only purpose for hearing your voice at this point, if I may
4 put it that way.

5 MR. MANDEL: Yes, and you won't hear it for too long,
6 your Honor.

7 I would just like to comment first on the things
8 that have been said to you. It has been argued that the Buckley
9 claim was settled and brought in good faith and that the
10 opinion letter was given in good faith and that the other
11 causes of action were brought in good faith and that nobody
12 knew what anybody else was doing and that the alleged
13 threats were just assertions of honest positions taken in good
14 faith. If all those things are true we cannot win. However,
15 what is before your Honor is a slice of life which we believe
16 looked at realistically and with understanding establishes
17 overwhelmingly a pattern of bad faith engaged in by the conspira-
18 tors named in the complaint and we think that the evidence
19 convicts the conspirators out of their own mouths. I will take
20 as an outstanding example the settlement of the Buckley
21 claim. It's easy to say that was done in good faith and
22 for a good reason, but it's a useless argument which overlooks
23 Persky's own testimony in deposition in which he said that
24 he asked for and got the assignment of the Buckley claim
25 as a little extra tacked onto that settlement for the purpose
of bringing home realities to Charlie Gross and showing him

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2 they were real claims that could be used against him. Now,
3 this is Persky's own testimony in deposition and you don't need
4 to rely on the bar sinister to understand what that means. The
5 first thing that your Honor must decide I think is the merits
6 of the Buckley claim itself and I am not going to argue it,
7 but here again we think that the very witnesses brought in by
8 our adversaries show what the real situation was. Even Mr.
9 Ryan's testimony shows that the judgment made by Silverman and
10 Miles on behalf of the partnership and concurred in by the
11 partners, that this was a knee jerk reflex to help with the
12 settlement and not a serious assertion of a claim was accurate
13 and here we get to the heart of this case on the law.

14 Ryan had the right to assert that claim on behalf
15 of Buckley against strangers tenuous though it was. Persky
16 and the partners of Newburger, Loeb did not have the right to
17 manipulate the settlement to acquire that claim by assignment
18 for the purpose of abusing partners and the crux of this case
19 when you put it altogether is not malicious prosecution or
20 abusive process, but violation of fiduciary duties by
21 persons having those duties and that includes the partners of
22 Newburger, Loeb, the general partners who knew what this claim
23 was about, had already made a judgment on it and then were
24 subverted by Persky's bright thinking under the management of
25 Risher and Muh who had their own reasons. I don't think you

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2 will be able to come away from the evidence in this case,
3 your Honor, without recognizing the powerful motivations on
4 the part of Risher, Muh, Kayne, Berkowitz and Sloane to push
5 this deal through and the powerful motivations on the part of
6 the general partners to push this deal through and the powerful
7 motivations on behalf of the creative Mr. Persky, and that was
8 Mr. Grutman's designation in the opening to the jury, to push
9 this deal through is necessary by riding roughshod over the
10 rights of Gross, Bleich and Donoghue. There is one factual
11 argument which they make again and again and again which I
12 think is important to put in prospective. They say it was
13 the limited partners, it was Steefel who felt they had these
14 claims against Gross. We already know that putting aside the
15 Buckley matter the claims against Gross were nonsense. They
16 picked out the best. Persky asked wild Ned Frank three or four
17 times for a menu. Column A and Column B, and they picked out
18 the best they could get and all they could get in the end was
19 this junk about the garage and this junk about the firm's
20 censure being Gross' responsibility and all of these that were
21 dismissed or they consented to the dismissal of except for the
22 claim that is still before you, but I don't think is in doubt,
23 your Honor, as to the unauthorized trading in the Buckley
24 matter. Those are the only two left out of the entire menu and
25 they were looking hard. Now, where did the limited partners get

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2 their ideas? The answer is clear. The limited partners under
3 their testimony knew nothing about any of these matters until
4 Risher and Muh called them in and started the war against the
5 general partners and Risher and Muh and the general partners,
6 really Ned Frank, I think, had to be the source for all of
7 this and the record is clear that they were the source for
8 it. Where does Steefel get his ideas or Richenthal get his
9 ideas if they believed them, but more compelling is that we
10 didn't sue the limited partners, they were duped, Steefel was
11 duped. His own testimony is that he was duped by Persky.
12 He thought Bleich and Donoghue were withdrawn. That's what he
13 said. Where did he get that from? Persky. But the
14 limited partners never did anything. They didn't sue Gross.
15 They didn't sue Bleich or Donoghue. We could have included
16 them in the conspiracy, but we think they were dupes and we
17 left them out, but the general partners knew. There was not
18 one live general partner who could be persuaded to come in
19 here to say Charlie Gross did unauthorized trading. Nobody
20 on the executive committee. What they had to do to give
21 facet to that claim is rely on junk in depositions of somebody
22 who is in Washington who could have come if he really had testi-
23 mony or Leo Stern, who is dead, but all of the live partners,
24 defendants though they were, were conspicuously absent here,
25 your Honor. The facts in this case, when viewed in reality with

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2 an understanding of what happened here, are overwhelming
3 and in viewing the record I think your Honor will perceive
4 that more than two-thirds of the defensive material
5 asserted and offered by my friends Grutman and Shaw consist
6 of smear, irrelevancy and red herring. When you get to
7 the testimony -- and we will point it out in the brief.
8 I will be painstaking -- you will see that out of their own
9 mouths they are convicted, out of their own witnesses they are
10 convicted and I will just end with Mr. Abrams, the last witness,
11 who honestly said it was understood -- their witness -- that
12 if a satisfactory deal could not be made with Gross, Bleich and
13 Donoghue, that the setoffs and counterclaims that we say and we
14 think your Honor will find are in bad faith would be used to hold
15 off their claims for their capital.

16 In finishing this ordeal for all of us I would like
17 to personally express my appreciation for your Honor's
18 participation in the ordeal throughout all of this difficult
19 seven-week period.

20 MR. SHAW: We would all like to say that, Judge.

21 THE COURT: Thank you very much.

22 All right, now, 60 days. You will exchange briefs.
23 You need not submit findings and conclusions, I will prepare my
24 own.

25 MR. SHAW: No replies, just exchange?